Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

EDWARD ROYCE STOLZ II,

PETITIONER

vs.

KSFM 102 FM,

RESPONDENT

On Petition for Writ of Certiorari
to the Supreme Court of the State of
California

PETITION FOR CERTIORARI

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93 PP

QUESTIONS PRESENTED

1. DOES THE FACT THAT A PLAINTIFF SLANDERED PER SE IS A RADIO STATION CONCLUSIVELY MAKE IT A PUBLIC FIGURE SHIFTING THE BURDEN OF PROOF ON PROVING FALSITY AND FORCING IT TO PROVE ACTUAL MALICE MERELY BECAUSE AS A BROADCASTER IT HAS THE ABILITY TO REBUT THE SLANDEROUS STATEMENT.

2. DOES THE FACT THAT A PLAINTIFF SLANDERED PER SE IS A RADIO STATION MAKE AN UNRELATED SUBJECT IT IS SLANDERED ABOUT OF PUBLIC CONCERN THUS SHIFTING THE BURDEN OF PROVING FALSITY OF THE STATEMENT MERELY BECAUSE RESPONSIBILITY IN BROADCASTING IS OF PUBLIC CONCERN.

3. IS THE OWNER OF A RADIO STATION A LIMITED PURPOSE PUBLIC FIGURE MERELY BY HIS OWNERSHIP THEREOF IN THE ABSENCE OF A SHOWING THAT HE HAS INTERJECTED HIMSELF IN

A PARTICULAR PUBLIC CONTROVERSY.

PARTIES TO THE PROCEEDINGS

Appellant is EDWARD ROYCE STOLZ, II. He individually does business as KWOD 106.5 FM.

Respondent is KSFM 102 FM. Respondent is wholly owned by Genesis Broadcasting, Incorporated. Genesis Broadcasting, Incorporated is a wholly owned subsidiary of Booth American, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District is printed in Appendix A hereto and is reported in part at 4 Cal.App.4th 195. The denial of the Petition for Review by the California Supreme Court is printed in Appendix B hereto.

JURISDICTION

The decree printed in Appendix, Exhibit 1, attached hereto, which Petitioner seeks to have reviewed is dated and was entered on November 18, 1994. Review by the California Supreme Court was denied on February 16, 1995.

The jurisdiction of this court is invoked under Title 28, section 1257 of the United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution relating to Freedom of Speech. The United States Supreme Court held that public

officials and public figures, when proceeding against a media defendant to recover damages for injuriously false statements, must prove "actual malice." (*New York Times Company v. Sullivan* (1964) 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686]; *Curtis Publishing Company v. Butts* (1967) 388 U.S. 130, 155 [87 S.Ct. 1909, 1991, 18 L.Ed.2d 1094].) Actual malice has been defined as knowledge of falsity of, or reckless disregard for the truth of, the statements made. (*New York Times Company v. Sullivan*, *supra*, 376 U.S. 254, 279-280.) The United States Supreme Court provided further guidance in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789].) In *Gertz*, the Supreme Court identified two types of public figures: (1) the "all-purpose" figure who has achieved such fame and notoriety that he or she is a public figure for all purposes; and (2) the "limited purpose" or "vortex" public figure

who has voluntarily injected himself or herself into a particular public controversy and becomes a public figure on a limited number of issues related to the public controversy. In both of the above circumstances, the burden of proof shifts to the person slandered to show the falsity of the statement. The burden of proof also shifts when the person slandered is a private figure but the words were of public concern.

STATEMENT OF THE CASE

The Sacramento County Superior Court action was based upon a Third Amended Complaint for slander alleging that respondent radio station KSFM 102 broadcast over the air on June 30, 1989, slanderous statements about petitioner's radio station KWOD 106.5 FM that petitioner's employees were having sex in the back of the petitioner's van with underage girls and that petitioner radio station had broadcast

derogatory remarks about Blacks calling them "niggers" and "jungle bunnies." (Trial Court Transcript C.T. 113-125.)

During the broadcast, respondent's employees made slanderous statements regarding KWOD 105.FM, specifically naming the station by its particular call letters and by referring to its individual owner/manager. The alleged defamatory statements instructed on by the court made by Respondent employees during the broadcast included the following: (Court Reporter's Transcript R.T. 1011:10-28; 1012:1-24.)

> "If you allow your station van to allegedly have underage girls in it performing sex with members of your staff which allegedly has happened with other radio station in town then you are an irresponsible broadcaster no matter what it is."

"If yours is a station that has people with underage girls screwing them in the back of a van."

"The radio should be part of your life to educate you and is shouldn't in fact promote violence within you to go out and beat up people such as Gays, Blacks because they happen to be Gay or Black."

"It's so bad when people hear on the radio 'ya, you're nothing but a nigger."

"Instead, a snot nose runty little punk who thinks his ego can runs the radio station goes on and calls...Black people niggers and jungle bunnies."

"I don't think a responsible act is for a manager of a radio station to allow a gentleman to call...Black people nigger and jungle bunnies."

Before taking any testimony in this action, the court and counsel discussed whether, for the purposes of the trial, the plaintiff was a public figure and whether the alleged slanderous statements, were of public concern. (R.T. 3-8.) The court indicated it had an opportunity to read the various briefs and motion in limine filed by counsel. (R.T. 3:26-27.) Appellant maintained that he was not a public figure and that the allegations of slander, which were the subject of the complaint, were not of public concern. However, respondent's trial brief (C.T. 388-413) contained only references to the alleged facts on these issues and no declarations or other

admissible evidence. (R.T. 4:18-27.) Defendant maintained that plaintiff was a public figure and that the alleged slanderous statements were of public concern. (R.T. 5:22-28; 6:1-20.) The court held that, in light of the *Live Oak Publishing Company v. Cohagan* (1991) 254 Cal.App.3d 1277, that the plaintiff was a "public figure." (R.T. 7:16-18.) The court also ruled that the allegedly slanderous statements, which were the subject of the litigation, were of public concern. (R.T. 7:19-28.) These rulings resulted in a shift of the burden of proof. The court specifically stated:

> "The court rules and finds that the plaintiff is a public figure for purposes of the burden of proof as well as having to prove the shifting of burden of proof from defense as well as requiring that the plaintiff prove actual malice as defined."

(R.T. 8:22-28.)

Appellant objected to this finding at the outset. (R.T. 3-8.)

Normally, the burden of proving the truth of a slanderous statement is on the defendant. *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, 228. However, if the plaintiff is a public figure, the burden is shifted and the plaintiff must prove that the defendant had knowledge of the falsity or reckless disregard. *New York Times v. Sullivan* 376 U.S. 254 (1976). Even if plaintiff is a private person and the slanderous statements are of public concern, the burden is shifted to the plaintiff to show the falsity was at least negligent. *Gertz v. Robert Welch* 248 U.S. 323 (1974).

The USE NOTE OF CALIFORNIA JURY

INSTRUCTIONS, CIVIL, January, 1994, Pocket Part, page 127 states

"A public figure or official plaintiff or a private figure plaintiff suing over public matters has the burden of proving that the matter published is false. If the action relates solely to private matters, truth is a defense, and defendant has the burden of proof. Delete the appropriate bracketed words in the second paragraph."

The court instructed the jury:

"As to all statements with the exception of those referring to sex in the van with minors, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish a statement or statements contained as

actual assertions that are defamatory on their face. As to any or all statements, the plaintiff has the burden of proving by a preponderance of the evidence, all of the facts necessary to establish that the statement or statements are false." (R.T. 1004:26-28; 1005:1-10.)

Appellant objected to these instructions. (R.T. 1144:14.) The actual objections to the instructions had been discussed among counsel and the court in chambers prior to the instructions, but placed in the record following the giving of the instructions (R.T. 1121:19-28; 1122:1) for the reason set forth by the court to avoid any further delays on the part of the jury hearing the instructions. (R.T. 1121:19-24.) Appellant's counsel objected, and the court noted said objections for the record to all references in the jury instructions,

particularly instructions 2.60 and 2.62 that referred to the shifting of the burden from defendant to plaintiff to prove the falsity of the statements which arose as a result of the court's finding that plaintiff was a public figure and that the slanderous statements were of public concern. (R.T. 1144:13-28; 1145:1-16.) These instructions included the following:

> "As to any or all statements, the plaintiff has the burden of proving by a preponderance of the evidence, all of the facts necessary to establish that the statement or statements are false." (R.T. 1005:6-10.)

> "The plaintiff has the burden of proving by clear and convincing evidence all of the facts necessary to establish that the defendant at the time of publication,

A. Knew that the statement was false and defamed plaintiff or,

B. Published the statement in reckless disregard of whether the matter was false and defamed the plaintiff." (R.T. 1006:12-21.)

"The essential elements of an action for defamation by slander in this case are:

1. The defendant broadcast orally defamatory statements about the plaintiff;

2. The defendant published the defamatory statement;

3. The defendant at the time of the publication

A. Knew that the statement was false and defamed plaintiff or,

B. Published the statement in reckless disregard of whether the matter was false and defamed the plaintiff." (R.T. 1009:17-28; 1010:1-3.)

"Plaintiff has the burden of proving by a preponderance of all the evidence all of the facts necessary to establish that the statement is false. (R.T. 1010:17-20.)

The court instructed that as a matter of law, the two statements regarding "sex in the back of the van" were slander per se (i.e., defamatory on their face) (R.T. 1011:10-21) and the others were left up to

the jury to determine if they were defamatory on their face. (R.T. 1012:3-5.)

During respondent's broadcast they repeatedly stated that their statements were in reference to a broadcast made by KWOD disc jockey Pat Garrett on June 13, 1989, in which derogatory statements were made regarding homosexuals. (R.T. 255:12-18.) However, the Garrett broadcast made no reference whatsoever to Blacks. (R.T. 255:12-18.) Nevertheless, the respondent's broadcast made several statements attributed to petitioner and to its employees alleging KWOD made derogatory statement about promotion of violence upon Blacks. (R.T. 240:21-28; 241:1-29.) Defendants' broadcast on two occasions also stated that appellant was allowing underage girls to have sex with his employees in the back of the KWOD van. (R.T. 244:7-23.) These statements directly imply petitioner's owner Mr. Edward Stolz as owner and manager was personally aware of

this alleged activity taking place in the back of his van, that this activity was taking place at or about the time of the broadcast in 1989 or during the time period shortly before. Respondent's disc jockey admitted that his only knowledge of sex in the back of the KWOD van was a statement made to him by a former KWOD employee in 1985 that he had been involved in such an act in the early 1980's. (R.T. 245:5-28; 246-248.)

The trial court held that petitioner was an all purpose public figure and that the subject of the slander was of public concern that required the shifting of the burden of proof.

The Court of Appeal in the published portion of its opinion held that Appellant was an "all purpose public figure" and that the subject of the slanderous statements were of "public concern."

The factual finding of the Court of Appeal on whether petitioner is a public figure is set forth at 30 Cal.App.4th at 204, 205

"We will first discuss whether KWOD is a public figure.

At trial plaintiff testified KWOD has been in operation since 1975 and is a 50,000-watt station, which is "the maximum power which is allowed by law in this region of the country." Plaintiff conceded KWOD is "well known to the public." Plaintiff testified he promoted KWOD in the mid-1980's with the slogan "the number one hit music station, KWOD." A decline in ratings since that time would not mean that people were no longer aware of the radio station. In 1993, the Sacramento News and Review published an article identifying KWOD as

"Sacramento's best radio station."

Additionally, in testifying at trial about KWOD's good reputation, plaintiff spoke of KWOD's pervasive power and influence on community affairs. Thus, he testified KWOD "is there for the purpose of entertaining and informing the public and, hopefully, committing to a degree of community service." He also stated: "Since the first day of operation, KWOD has been committed to a variety of good works in the community including participation in fund raisers for a variety of charitable organizations and foundations. Furthermore, we have developed and programmed large numbers of independently produced radio programs which have been attuned to meeting certain problems and needs within the

community. Lastly, the radio station has been engaged in providing free services to literally, literally tens of thousands of community organizations, clubs, groups, since day one in publicizing their events and matters that they believe are of significance to their own members."

According to plaintiff, KWOD engages in much more public service programming than other radio stations. He gave examples of some of the issues addressed in KWOD's public service programming--youth suicides, causes and treatment of birth defects, lung aliments, the common cold, stress, consumer affairs, taxes, Sacramento light rail system, and an open forum on Sacramento transportation issues. "There were thousands" of such programs. Plaintiff also testified

KWOD regularly participates in fund raising events for the March of Dimes, Sacramento SPCA, American Heart Association, and other organizations. According to plaintiff, the reason for involving the station with community service is that "this is the only independently owned and locally owned radio station in the entire community. As a local resident, this is a way of giving something back to the community. It is, in fact, a good proposition in order to maintain close contact and rapport with our audiences."

The allegedly defamatory communications were broadcast by a Sacramento radio station which competes in the same market as KWOD.

This record sufficiently demonstrates

that KWOD is an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast."

The factual finding of the Court of Appeal on whether the issue in question was of public concern is set forth at 30 Cal.App.4th 207, 208

"Plaintiff argues that at the time of defendants' broadcast, there was no public concern regarding plaintiff condoning racist remarks over the air or allowing sex with minors in the KWOD van. However, plaintiff takes too narrow a view. "'[W]hether ... speech addresses a matter of public concern must be determined by [the expressions's] content, form, and

context ... as revealed by the whole record.'" (*Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 761 [86 L.Ed.2d 593, 604, 105 S.Ct. 2939].) Here, the matter of public concern was irresponsibility in radio broadcasting. That was the topic of defendant's two-and-one-half-hour program. The trial court indicated that almost every page of the Morning Zoo transcript contained a reference to responsibility in broadcasting. The conceded purpose of radio is to inform as well as entertain. The pervasive power and influence of radio reaches into homes and offices, schoolyards and street corners. Radio reaches large numbers of people and even children away from parental supervision. For these reasons, we believe responsibility in broadcasting is a matter of public

concern. That some statements, such as the "sex with minors in the van" remarks, do not directly implicate broadcasting does not detract from our conclusion. "Freedoms of expression require '"breathing space."'" (*Philadelphia Newspapers, Inc. v. Hepps*, *supra*, 475 U.S. at p. 772 [89 L.Ed.2d at p. 790].)

The factual finding that petitioner owner is a limited purpose public figure is set out at 30 Cal.App.4th 206, 207

"(1c) This leaves the question whether plaintiff is a public figure as owner, operator, and general manager of KWOD. We conclude the answer is yes.

Thus, plaintiff brought this lawsuit in his own name "dba KWOD 106 FM," alleging he was and is "an individual

conducting business as Radio Station KWOD 106 FM..." The allegedly defamatory remarks referred to KWOD by name and only by extension to plaintiff as owner and operator of the radio station."

"In this case, we have no occasion to determine whether plaintiff, as owner/operator of a radio station, might be deemed a public figure for all purposes. Thus, for example, we do not face a situation where plaintiff is accused of purely personal wrongful conduct, such as child abuse. Here, the offensive speech related directly to the operation and management of plaintiff's radio station. Thus, for present purposes, it is sufficient to conclude (and we do) that, at least with respect to matters directly

related to the operation and management of his radio station, plaintiff is a limited-purpose public figure. We reach this conclusion for all the reasons, described above, that the radio station itself is a public figure. These reasons apply equally to plaintiff as the owner/operator of the station."

REASONS FOR ALLOWANCE OF THE WRIT

1. DOES THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER AUTOMATICALLY MAKE HIM A PUBLIC FIGURE SHIFTING THE BURDEN OF PROOF TO PROVE THE FALSITY OF THE STATEMENT AND REQUIRING A SHOWING BY CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE MERELY BECAUSE AS A BROADCASTER HE HAS THE ABILITY TO REBUT THE STATEMENT.

Certiorari should be granted to clarify the definition of a "public figure" and interpretation of what is of "public concern" and determine if the definitions should be expanded to the degree expressed

in the published Appellate opinion. The appellate court's holding is that merely because plaintiff is a radio broadcaster and as such has access to rebut slanderous statements on its own music radio station, this conclusively makes him a public figure. The Appellate opinion details petitioner's testimony of how popular his station is and all the community services it performs. However, all radio stations are known to some segment of population. Furthermore, it is common knowledge that all broadcasters provide airtime for public messages and public affairs programming. All broadcasters allow for such time because in their license renewal applications with the FCC they are required to set forth what good deeds they have done for their community. The litany of good deeds set forth by petitioner regarding his station can be matched by any responsible broadcaster acting in compliance with FCC rules. The

appellate court in its published opinion has set forth a precedent never determined by any other court by making all broadcasters conclusively deemed to be "public figures."

The appellate court holding that the facts set forth 30 Cal.App. 4th, 204, 2-5 makes Petitioner an all purpose public figure does not specifically state this is the case merely because it is a broadcaster. The analysis employed by the court to reach this conclusion at 30 Cal.App. 4th at 205 is however the equivalent of this finding. In its analysis, the appellate court stated that Petitioner has achieved a general fame in the community by the public service broadcasting that it performs and that as a radio station it has the ability to rebut any slander. However, this can be said of any radio station. But because a radio station broadcasts public service messages, etc. does that make it an all purpose public

figure? The appellate court wrongfully presumed that these type of public deeds by a broadcaster causes it to be labeled an all-purpose public figure. A music radio station's broadcast of public services messages and airing of topics of public importance common among radio stations does not equate with a position of persuasive power and influence. Here, petitioner is an F.M. music and entertainment broadcaster that incidentally engages in public affairs and service to meet its FCC requirements. Reference is made at 30 Cal.App. 4th at 204 of plaintiff being the "number one hit music station." An individual as a business can be well known. That does not make it a public figure. Many local businesses such as restaurants are well known. Because they are involved in charitable events or public events does that make them an all purpose public figure. Does such conduct equate with an assumption of especial prominence in

the affairs of society?

Further, although the petitioner herein had access to the media, it was not access in the sense that an all purpose public figure has. Here, petitioner had access to his own radio station. An all purpose public figure is the type that commands the attention of television, newspapers and many radio stations. There is no connection or evidence set forth in the appellate opinion that petitioner falls into this category. If the best that can be said about the station is that it airs public service ads and is involved in community activities this is insufficient as a matter of law under Gertz to hold it is a public figure. In *Waldbaum v. Fairchild Publications, Inc.* (1980) 627 F.2d 1287, 1294 the court held applying the *Gertz* test that "the public's preoccupation with him indicates the media would cover such an individual's response to statements he believes are inaccurate or

unsupported.

Allowing this appellate decision to stand could make slander against broadcasters a more common occurrence because they would have to prove falsity and actual malice (actual knowledge of falsity or reckless disregard of the truth). The media in this country is the primary promulgator of what is supposed to be the truth. Lately with tabloid journalism that even the major networks seem to be stooping to in sensational cases this idealism has come into question. This court should consider whether these broadcasters themselves will be subject to slander by other broadcasters knowing that the slandered broadcaster will have the burden to prove the falsity with actual malice. Is a free-for-all against a media plaintiff acceptable by virtue of its position alone or should one who slanders a local music radio station still be required

to prove up its statements.

In the case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, the court in emphasizing the importance of free expression and a free press under the First Amendment determined that public officials may not prevail in an action for libel relating to their official conduct unless proof that the statement was made was with "actual malice." Later, in *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, the court held that "public figures" like public officials must also prove actual malice in order to recover in a defamation action. Later in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, the court defined two classes of public figures, one being the "all purpose" public figure who has achieved such pervasive fame and notoriety that he becomes a public figure for all purposes and in all contexts, and a "limited purpose" or "vortex" public figure, an individual who

voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of purposes. (418 U.S. at 351.) In the instant action the Court of Appeal stated in its opinion that petitioner has been involved in a great deal of community service and addressed various public programming issues such as youth suicides, medical issues, and consumer affairs. Furthermore, the court went on to state how plaintiff testified regarding being involved in fund raising events for the March of Dimes, etc. These factors led the court to conclude that "KWOD is an all purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast." None of these good deeds however appear to have anything to do with the particular issue of alleged defamation

being, particularly, the sex in the van with minors issue. Therefore, where petitioner has not voluntarily injected itself into a particularly public controversy (sex in van with minors) the Court of Appeal has discarded this standard when the slandered party is a broadcaster. The Court of Appeal opinion creates a new test for broadcasters making them absolutely subject to proving actual malice and weakening the holding in *Gertz*. This court in the case of *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, citing *Gertz* shied away from giving media defendants absolute protection. The court stated at 48 Cal. 3d at 742:

> "The news media contend the threat of defamation actions has a 'chilling effect' on their willingness to report the news. Stated conversely, the argument is that obstacles to recovery for defamation increase the

media's ability to report the news. 'The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.... Yet absolute protection for the communication media requires a total sacrifice of the competing value served by the law of defamation.' *Gertz*, *supra*, 418 U.S. at p. 341. There must be a 'proper accommodation between the law of defamation of speech and press.' (Citation omitted.)"

In the *Brown* case the court also stated at

48 Cal. 3d at 744, "A person is not a public figure merely because he happens to be involved in a controversy that is newsworthy." The court in *Brown* also held at 48 Cal. 3d at 7 48:

> "We reject the news media's contention that a negligence standard will subject them to such self-exacting scrutiny that it will have a 'chilling effect' on the free flow of information. This argument is speculative. Its implicit premise is that if a news media business can be held responsible for its falsehoods, it will be less likely to report the news. This suggests that the news media's only reason to be accurate is to avoid legal liability."

2. THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER DOES NOT AUTOMATICALLY MAKE ANY SUBJECT IT

IS SLANDERED ABOUT OF PUBLIC CONCERN SHIFTING THE BURDEN OF PROOF AS STATED ABOVE IN ISSUE NO. 1 MERELY BECAUSE ANYTHING SAID ABOUT A BROADCASTER IS OF PUBLIC CONCERN SINCE RESPONSIBILITY IN BROADCASTING IS OF PUBLIC

The appellate court also held that the defamatory speech involved matters of public concern. The appellate court stated that the thrust of the entire radio program at issue was over broadcaster responsibility and that the "sex in the van with minors" statements which the trial court held were slander per se were somehow bound up in this subject and therefore subject to freedom of expression's "breathing space." The issue here is whether a slanderous statement conclusively becomes a matter of "public concern" when it is spoken against a broadcaster in the guise that the broadcaster has caused to be aired a discussion of a subject that would involve responsibility in broadcasting. If respondent's broadcast had never discussed

radio station responsibility but between songs came out and said petitioner was allowing its van to be used by employees to have sex with minors would that suddenly become of "public concern," particularly here where plaintiff had never interjected itself in any way on this issue over the air or in any public manner. . . . . .

Here although the issue of broadcasters' responsibility towards the public may have been of public concern as well, that is nevertheless not a stepping stone to a competitor making other defamatory statements particularly the ones decided by the court to be slander per se regarding sex in the van with minors.

Under the appellate court's theory, one could force the slandered party to prove the falsity of a slanderous per se statement as long as it was stated in the context of a broader subject. The appellate opinion lets slanderers get away with not having to prove

the truth of their statements by allowing them to claim their part of a broader discussion. The constitution has never been allowed to be used as a shield in that way.

In *Waldbaum v. Fairchild Publications, Inc.* (1980) 627 F.2d 1287, 1298, the court held "Misstatements wholly unrelated to the controversy, however, do not receive the New York Times protection."

3. IS THE OWNER OF A RADIO STATION A LIMITED PURPOSE PUBLIC FIGURE MERELY BY HIS OWNERSHIP THEREOF IN THE ABSENCE OF A SHOWING THAT HE HAS INTERJECTED HIMSELF IN A PARTICULAR PUBLIC CONTROVERSY.

The Court of Appeal held that petitioner owner is a limited purpose public figure for all the reasons that the station itself is a public figure. The court held at 30 Cal.App.4th at 195 that "the alleged defamatory remarks referred to KWOD by name and only by extension to plaintiff as owner and operator of the radio station." Petition in one statement regarding sex in

the van with minors was not only referred to by extension. In one statement by Mr. Collins he said "If you allow your station van to allegedly have underaged girls in performing sex..." The phrase "if you allow your station" clearly implies that the ownership of the station knew of the event, condoned the event and that it was occurring at the present time. Why has petitioner owner become a limited purpose public figure? There was no evidence this individual ever involved himself in any controversy regarding sex with minors or any related subject. He caused his music radio station to air public service announcements and to participate in charitable events. When an owner of a radio station does these "good deeds" is his reward that if he is slandered he has to prove the falsity of the statement. Petitioner owner under the facts referred to in the appellate opinion is not a limited purpose public figure. In

Waldbaum at 1299 "being an executive within a prominent and influential company does not by itself make one a public figure."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated: May 17, 1995

PANOS M. LAGOS
Attorney for Petitioner
EDWARD ROYCE STOLZ, II

APPENDICES

CERTIFIED FOR PARTIAL PUBLICATION*/

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

EDWARD R. STOLZ II,

Plaintiff and Appellant,

v.

KSFM 102 FM et al.,

Defendants and

Respondents.

C016759

(Super. Ct. No. CV519825)

FILED
Nov 18 1994
COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, Clerk
BY _____ Deputy

APPEAL from a judgment of the Superior Court of Sacramento County. Gary S. Mullen, Judge. Affirmed.

John S. Sargetis for Plaintiff and Appellant.

Hardy Erich Brown & Wilson and Bruce E. Salenko for Defendants and Respondents.

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*/ Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV and V of the Discussion.

In this defamation action, plaintiff Edward R. Stolz II, doing business as KWOD 106.5 FM, appeals from a judgment upon a jury's verdict in favor of defendants KSFM 102 FM, Genesis Broadcasting Co., and Chris Collins. Plaintiff contends the trial court erred in (1) determining he is a public figure and the speech involved matters of public concern, (2) instructing the jury that to establish falsity of the allegedly defamatory statements the "gist" of the information must be false, (3) admitting negative evidence of plaintiff's reputation, and (4) failing to instruct the jury that certain statements were slanderous per se. Plaintiff also contends no substantial evidence supports the defense verdict.

In the published portion of this opinion we conclude the trial court correctly ruled plaintiff was a public figure and the speech involved matters of public concern. In an unpublished portion of the opinion, we

reject plaintiff's remaining contentions of error. We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the owner, operator, and general manager of radio station KWOD 106.5 FM in Sacramento, licensed and regulated by the Federal Communications Commission (FCC).

On June 13, 1989, KWOD disc jockey Pat Garrett made derogatory remarks about homosexuals on the air. He began by saying his girlfriend had left him for someone named Bruce, a name which undoubtedly belonged to a "limp-wristed queer," a "faggot." Garrett encouraged listeners to call in during the broadcast with similar comments. One caller stated words to the effect that all homosexuals should be killed.

The broadcast generated a reaction in the Sacramento community. An article in the Sacramento News and Review reported that

KWOD's broadcast had inflamed the homosexual community, which was planning a boycott of KWOD and its advertisers. Another radio station, KFBK, devoted a program to the incident. In response to complaints from members of the homosexual community, a mediator from the Sacramento Human Rights and Fair Housing Commission met with KWOD representatives, who after some resistance ultimately broadcast an apology.

On June 30, 1989, Sacramento radio station KSFM made the incident the subject of an on-the-air discussion about irresponsible radio broadcasting during KSFM's "Morning Zoo" program. KSFM employees Chris Collins and Mike Reynolds specifically referred to KWOD as the subject of their comments, took calls from listeners during the two-and-one-half-hour pro
gram, and encouraged listeners to contact the FCC to complain about KWOD.

One caller stated he had called KWOD

after KWOD's broadcast to complain the derogatory remarks about homosexuals were comparable to racist remarks such as "nigger" or "jungle bunny," which certainly would not be uttered on the air. According to the caller, the KWOD disc jockey said he accepted the challenge and would utter such racial slurs on the air in the future. Although the KWOD disc jockey did not make racist remarks on the air, this call to KSFM generated the following comments on the air by KSFM employees, related to the issue of race:

1. "The radio station should be part of your life to educate you and it shouldn't, in fact, promote violence within you to go out and beat up . . . people such as gays or blacks because they happen to be gay or black." (Italics added.)

2. "It's so bad when people hear on the radio 'yeah, you faggot, you queer, you're nothing but a Nigger.' " (Italics added.)

3. "Instead, a snot-nosed runty little punk who thinks his ego can run the radio station, goes on and calls people faggot and queers, and calls black people Niggers and jungle bunnies." (Italics added.)

4. "I don't think a[] []responsible act is for a manager of a radio station to allow a gentleman to call gay people faggots and queers and to call black people niggers and jungle bunnies." (Italics added.)

Toward the end of the Morning Zoo program, Collins also made the following comments on the air:

1. "[I]f you allow your station van to allegedly have underaged girls in it performing sex with members of your staff which allegedly has happened with other radio stations in town, then you are an irresponsible broadcaster no matter what it is."

2. "If yours is a station that has people with underaged girls screwing them in the

back of the van."

The source of these references, as explained by Collins at trial, was a former KWOD employee, who in 1985 told Collins that while employed at KWOD he had on one occasion had sex in the KWOD van with underage high school girls.

In proceedings in limine, the trial court ruled that plaintiff is a public figure, thereby imposing upon plaintiff the burden to prove falsity of the allegedly defamatory communications and "actual malice," i.e., that defendants made the statements with knowledge or reckless disregard of their falsity. The trial court further found the speech involved matters of public concern, thereby imposing upon plaintiff the burden to prove falsity regardless of his status as a public figure. The trial court also ruled that the statements about sex with minors were slanderous per se, because they imputed criminal conduct, but left to the jury the

question whether the race-related statements were slanderous per se, as alleged by plaintiff. Plaintiff's trial theory, as presented to the jury, was that all the statements were defamatory per se, such that injury to reputation was presumed and no actual damages needed to be shown.

Following a two-week jury trial, the jury returned a general verdict in favor of defendants.

Additional facts appear in our discussion.

DISCUSSION

I. Public Figure and Issues of Public Concern

Plaintiff contends the trial court erred in ruling that he is a public figure and that the speech involved matters of public concern. We disagree.

The trial court ruled plaintiff is both (1) an "all purpose" public figure and (2) a "limited purpose" public figure by reason

of having injected himself into the particular public controversy giving rise to the defamation. As will appear, the effect of the ruling that plaintiff is a public figure was to impose upon plaintiff the burden to prove that the allegedly defamatory statements were false and that defendants made the statements with knowledge or reckless disregard of their falsity.

The trial court also ruled the allegedly defamatory speech involved matters of public concern. This ruling independently imposed on plaintiff the burden to prove falsity of the statements, regardless whether plaintiff is a public figure or private figure. (Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 753, fn. 37, citing Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775 [89 L.Ed.2d 783, 792].)

Thus, in a defamation action the burden is normally on the defendant to prove the

truth of the allegedly defamatory communications. (Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 233.) However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the "public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." (Philadelphia Newspapers, Inc. v. Hepps, supra, 475 U.S. at p. 775 [89 L.Ed.2d at p. 792]; Brown v. Kelly Broadcasting Co., supra, 48 Cal.3d at p. 753, fn. 37.) Additionally, "[i]f the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [citation], that the libelous statement was made with "'actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' " (Reader's Digest Assn. v. Superior Court

(1984) 37 Cal.3d 244, 256 [208 Cal.Rptr. 137, 690 P.2d 610], citing New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280 [11 L.Ed.2d 686, 706, 84 S.Ct. 710].)

The rationale is twofold: "First, [] public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective 'self help.' Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements. [Citation.] Second, and more significantly, [] public figures are less deserving of protection than private persons because public figures [] have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' [Citations.]" (Reader's Digest Assn., v. Superior Court, supra, 37 Cal.3d at p. 253,

citing Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 345 [41 L.Ed.2d 789, 808, 94 S.Ct. 2997].) Thus, public figures "'can be said to have voluntarily exposed themselves to public scrutiny and must accept the consequences ....' " (Live Oak Publishing Co. v. Cohagan (1991) 234 Cal.App.3d 1277, 1289 [286 Cal.Rptr. 198].)

"For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (Gertz, v. Robert Welch, Inc., 418 U.S. at p. 345 [41 L.Ed.2d at p. 808].) This category is designated "all purpose" public figure. (418 U.S. at p. 351 [41 L.Ed.2d at p. 812].) All-purpose public figurehead will not be lightly assumed; in order for a plaintiff to be deemed an all-purpose public figure, there must be "clear evidence of

general fame or notoriety in the community, and pervasive involvement in the affairs of society ...." (418 U.S. at p. 352 [41 L.Ed.2d at p. 812].)

"More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (Gertz, v. Robert Welch, Inc., supra, 418 U.S. at p. 345 [41 L.Ed.2d at p. 808].) This "limited purpose" or "vortex" public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (418 U.S. at p. 351 [41 L.Ed.2d at p. 812].) "Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a

public controversy." (Reader's Digest Assn., v. Superior Court, supra, 37 Cal.3d at pp. 253-254.)

The designation of public figure may rest on either of these two alternative bases--all-purpose or limited-purpose. (Gertz, v. Robert Welch, Inc., supra, 418 U.S. at p. 352 [41 L.Ed.2d at p. 812].) "In either event, they invite attention and comment." (Id. at p. 345 [41 L.Ed.2d at p. 808].)

The question whether a plaintiff is a public figure is to be determined by the court, not the jury. (Deanev v, Lawrence (1994) 22 Cal.App.4th 927, 933 [27 Cal.Rptr.2d 556].) The trial court's decision is a "mixed question of law and fact. [The trial court] must determine the predicate facts upon which it then concludes whether, as a matter of law, a plaintiff is or is not a [] public figure. [Citation.] When the appellate court is called upon to review the trial court's decision in this

regard, its standard of review is whether, after an independent review of the entire record, substantial evidence supports the trial court's decision. [Citation.]" (Ibid.; see also McCoy v. Hearst Corp. (1986) 42 Cal.3d 835, 842 [231 Cal.Rptr. 518, 727 P.2d 711].)

Here, plaintiff complains the trial court improperly made the public figure determination based upon argument rather than evidence. However, although the issue was determined in limine without presentation of evidence, our review looks to the entire record to see if substantial evidence supports the public figure determination. (Denney v. Lawrence, 22 Cal.App.4th at p. 933.)

We will first discuss whether KWOD is a public figure.1

At trial plaintiff testified KWOD has been in operation since 1975 and is a 50,000-watt station, which is "the maximum

power which is allowed by law in this region of the country." Plaintiff conceded KWOD is "well known to the public." Plaintiff testified he promoted KWOD in the mid-1980's with the slogan "the number one hit music station, KWOD." A decline in ratings since that time would not mean that people were no longer aware of the radio station. In 1993, the Sacramento News and Review published an article identifying KWOD as "Sacramento's best radio station."

Additionally, in testifying at trial about KWOD's good reputation, plaintiff spoke of KWOD's pervasive power and influence on community affairs. Thus, he testified KWOD "is there for the purpose of entertaining and informing the public and, hopefully, committing to a degree of community service." He also stated: "Since the first day of operation, KWOD has been committed to a variety of good works in the community including participation in fund

raisers for a variety of charitable organizations and foundations. [¶] Furthermore, we have developed and programmed large numbers of independently produced radio programs which have been tuned to meeting certain problems and needs within the community. [¶] Lastly, the radio station has been engaged in providing free services to literally, literally tens of thousands of community organizations, clubs, groups, since day one in publicizing their events and matters that they believe are of significance to their own members."

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1 A business entity may be the subject of defamation. (Vegod Corp. v. American Broadcasting Companies, Inc. (1979) 25 Cal.3d 763, 770 [160 Cal.Rptr. 97, 603 P.2d 14J corporation.)

According to plaintiff, KWOD engages in much more public service programming than other radio stations. He gave examples of some of the issues addressed in KWOD's public service programming--youth suicides,

causes and treatment of birth defects, lung ailments, the common cold, stress, consumer affairs, taxes, Sacramento light rail system, and an open forum on Sacramento transportation issues. "There were thousands" of such programs. Plaintiff also testified KWOD regularly participates in fund raising events for the March of Dimes, Sacramento SPCA, American Heart Association, and other organizations. According to plaintiff, the reason for involving the station with community service is that "this is the only independently owned and locally owned radio station in the entire community. As a local resident, this is a way of giving something back to the community. It is, in fact, a good proposition in order to maintain close contact and rapport with our audiences."

The allegedly defamatory communications were broadcast by a Sacramento radio station which competes in the same market as KWOD.

This record sufficiently demonstrates that KWOD is an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast. (Waldbaum v. Fairchild Publications, Inc. (D.C. Cir. 1980) 627 F.2d 1287, 1295-1296, fn. 22 [201 U.S. App. D.C. 301, 627 F.2d 1287] [nationwide fame is not required; question is whether plaintiff has achieved notoriety in community where he was defamed].) Thus, KWOD's control of the airwaves allows it to reach a wide audience. KWOD thrusts itself into the public eye on a daily basis, seeking public attention. KWOD has pervasive involvement in the affairs of society by selecting and presenting public affairs programs on a wide range of topics. Thus, KWOD has "voluntarily exposed [itself] to public scrutiny and must accept the consequences .. .." (Live Oak Publishing Co. v.

Cohagan supra, 234 Cal.App.3d at p. 1289.) Moreover, KWOD is less vulnerable to injury from defamation because of its ability to resort to effective self-help through access to the media. (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 256 [access to media is a key factor in determining public figure status].) Indeed, KWOD not only has access to the media; it is a medium.2

We conclude KWOD is an all-purpose public figure.

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2 Defendants contend the fact that KWOD is subject to FCC regulation is another factor in assessing public figure status. (Reliance Insurance Co. v. Barron's (S.D.N.Y. 1977) 442 F.Supp. 1341, 1348].) However, Blue Ridge Bank v. Veribanc, Inc. (4tb Cir. 1989) 866 F.2d 681, criticized Reliance and rejected the proposition that a business enterprise loses the protection of defamation law by being subject to government regulation in the public interest.

This leaves the question whether plaintiff is a public figure as owner, operator, and general manager of KWOD. We conclude the answer is yes.

Thus, plaintiff brought this lawsuit in his own name "dba KWOD 106 FM," alleging he was and is "an individual conducting business as Radio Station KWOD 106 FM ...." The allegedly defamatory remarks referred to KWOD by name and only by extension to plaintiff as owner and operator of the radio station.

In Live Oak Publishing Co. v. Cohagan, supra, 234 Cal.App.3d 1277, we held a newspaper's managers were public figures for purposes of a slander suit. There, the newspaper published an article about a political candidate. A supporter of that candidate accused the newspaper and its managers of intentionally garbling the article to influence the outcome of the election, intentionally "crucifying" the

candidate, and lying. (234 Cal.App.3d at pp. 1281-1282, 1287.) We determined both the newspaper and its managerial employees were public figures. (234 Cal.App.3d at pp. 1289-1290.)

"[A]n author, and especially a newspaper, often acts with the purpose of fostering public debate. "'The Constitution specifically selected the press ... to play an important role in the discussion of public affairs....'" [Citations.] A newspaper is uniquely possessed of 'sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. []' [Citations.]" (Live Oak Publishing Co. v. Cohagan, supra, 234 Cal.App.3d at pp. 1289-1290.)

As to the newspaper's managers, we said: "[T]hese managerial individuals [] operated the newspaper. The owner and publisher,

general manager and editors of the Escalon Times are intimately involved in public political debate in their community and the community has a legitimate and substantial interest in their conduct regarding the operation of the newspaper. [Citation.] We do not believe these plaintiffs were 'more vulnerable to injury,' justifying any special protection. [Citation.] They, too, are public figures." (Live Oak Publishing Co. v. Cohagan, supra, 234 Cal.App.3d at p. 1290.)

In Live Oak Publishing Co., we did not specify whether the newspaper's managerial employees were all-purpose or limited-purpose public figures. However, we noted the community has a legitimate interest in their conduct "regarding the operation of the newspaper." This language suggests the employees' public figure status might be limited to matters regarding the operation of the newspaper.

In this case, we have no occasion to determine whether plaintiff, as owner/operator of a radio station, might be deemed a public figure for all purposes. Thus, for example, we do not face a situation where plaintiff is accused of purely personal wrongful conduct, such as child abuse. Here, the offensive speech related directly to the operation and management of plaintiff's radio station. Thus, for present purposes, it is sufficient to conclude (and we do) that, at least with respect to matters directly related to the operation and management of his radio station, plaintiff is a limited-purpose public figure. We reach this conclusion for all the reasons, described above, that the radio station itself is a public figure. These reasons apply equally to plaintiff as the owner/operator of the station. (See Live Oak Publishing Co. v. Cohagan, supra, 234 Cal.App.3d at p. 1290.)

We also conclude the trial court did not err in determining the subject matter of the allegedly defamatory speech involved matters of public concern. As indicated, this ruling independently imposed upon plaintiff the burden to prove falsity of the statements.

"When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." (Philadelphia Newspapers, Inc. v. Hepps, supra, 475 U.S. at p. 775 [89 L.Ed.2d at p. 792].)

Plaintiff argues that at the time of defendants' broadcast, there was no public concern regarding plaintiff condoning racist remarks over the air or allowing sex with minors in the KWOD van. However, plaintiff takes too narrow a view. "'[W]hether . . . speech addresses a matter of public concern

must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.'" (Dun & Bradstreet, Inc. v. Greenmoss Builders (1985) 472 U.S. 749, 761 [86 L.Ed.2d 593, 604, 105 S.Ct. 2939].) Here, the matter of public concern was irresponsibility in radio broadcasting. That was the topic of defendant's two-and-one-half-hour program. The trial court indicated that almost every page of the Morning Zoo transcript contained a reference to responsibility in broadcasting. The conceded purpose of radio is to inform as well as entertain. The pervasive power and influence of radio reaches into homes and offices, schoolyards and street corners. Radio reaches large numbers of people and even children away from parental supervision. For these reasons, we believe responsibility in broadcasting is a matter of public concern. That some statements, such as the "sex with minors in the van"

remarks, do not directly implicate broadcasting does not detract from our conclusion. "Freedoms of expression require ' "breathing space." ' " (Philadelphia Newspapers, Inc. v. Hepps, supra, 475 U.S. at p. 772 [89 L.Ed.2d at p. 790].)

We conclude the trial court properly determined plaintiff is a public figure for purposes of this lawsuit and the speech at issue is of public concern.

II. Jury Instructions

Plaintiff contends the trial court erred in instructing the jury, over his objection, with an assertedly confusing definition of falsity which unfairly enhanced his burden of proving falsity by allowing the jury to consider the truth or falsity of the entire Morning Zoo program rather than the six sentences regarding racism and sex with minors. We disagree.

The trial court instructed the jury as

follows:

"An essential element of defamation by slander is that the statement published was false....

" . . . . . .

"Plaintiff has the burden of proving that the information conveyed is substantially false.

"*To establish falsity, Plaintiff must prove that the substance, the gist of [sic] the sting of the information conveyed was false.*

" . . . . . .

"The information conveyed may not be literally true in every word[;] minor inaccuracy or omission of minor detail are not sufficient to amount to falsity.

"Where the information which was inaccurate would have no[] different effect on a listener's mind than would the literal truth, the variance is immaterial." (Italics added.)

Plaintiff does not contend the instructions were substantively incorrect. In fact, the instructions correctly stated the law. "The concept that it is the gist or sting of the allegedly defamatory statements that must be false rather than the specific details of the charge is deeply rooted in our common law. [Citation.]" (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1009, fn. 17.)

Plaintiff instead complains the instructions defining falsity were inappropriate under the circumstances of this case, because the jury could conclude the statements were false but the gist of the entire "Morning Zoo" program (the tape and transcript of which were admitted into evidence) was not.

He asserts the instructions gave the jury an "escape hatch by which they could have been influenced that since the proposed

slanderous statements took up a total of probably less than a minute of a three hour broadcast that even though they were false were otherwise trivial based on the time devoted to those statements. Where specific isolated statements made in a three hour broadcast are clearly distinct from the total broadcast, a gist instruction is not called for."

Plaintiff cites no legal authority to support his position. In any event, as part of the jury instructions the trial court read to the jury the six specific statements set forth above--four race-related statements and two statements about sex with minors. The jury was told falsity of these statements was an essential element of defamation. We believe that, in context, the instructions adequately connected the falsity inquiry to the specific statements.

Plaintiff also complains the gist instruction is not contained in BAJI.

However, BAJI is not the sole source of jury instructions. (See Cal. Jury Instns., Civ. (7th ed. 1986) p. VI [judges are free to modify or supplement BAJI instructions].) Moreover, courts have indicated the use of special instructions on the gist of defamatory statements is proper. (See, e.g., *Gantry Const. Co. v. American Pipe Constr. Co.* (1975) 49 Cal.App.3d 186, 194.)

Plaintiff further contends the gist instruction had no applicability to the "sex with minors" statements because it is inconsistence with slander per se, and the jury should have been so instructed. However, the determination of slander per se merely relieves the plaintiff of the need to prove damages because injury to reputation is presumed; it does not relieve the plaintiff of the obligation to prove the falsity of the statements. (See *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1609; *Douglas v. Janis* (1974) 43 Cal.App.3d 931,

938-939; *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 20-21; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § § 489-490, p. 577.)

Plaintiff also contends the instructions regarding falsity would "cause the jury to believe that even if a statement is false, there's no damage." The contention is without merit.

We conclude plaintiff has failed to show error in the jury instructions.

III. Substantial Evidence

Plaintiff next contends no substantial evidence supports the defense verdict with respect to the "sex with minors" statements. We disagree.

Plaintiff's position is unclear but seems to be that there was no evidence from which a jury could conclude the statements were "anything but knowingly false or made in reckless disregard of the truth."

However, plaintiff did not even establish

the statements were false. Thus, the evidence showed as follows:

Collins testified he was told by former KWOD employee Timothy Stevens that Stevens had used the KWOD van for a sexual liaison with high school girls who were minors. This conversation took place in 1985. Stevens indicated the sexual liaison occurred in the early 1980's. The topic arose when Collins was briefing Stevens, who had joined the KSFM staff, on KSFM rules regarding the use of the company van. Collins said no non-employees were allowed in the van. Stevens said it was a lot different at KWOD, were non-employees were allowed in the van "if they were good looking enough." Stevens then related an incident where he met a few high school girls at a rally and had sex with them in the KWOD van. Collins said, "Hopefully, they were over 18." Stevens replied they were not.

In the face of this evidence, plaintiff contends on appeal that the "sex with minors" statements implied the practice was current, ongoing, engaged in by numerous KWOD employees, and known to KWOD management. Plaintiff then states there was no evidence that the practice was current, ongoing, engaged in by numerous KWOD employees, and known to KWOD management.

However, even where a statement is defamatory per se, the trier of fact is allowed to view it in context and determine how the statement was understood. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.) Here, although the statements were phrased in the present tense, such usage of the present tense to relate past events is a rhetorical device of common usage. Although the statements referred to the plural "members" of a radio station staff, they also referred to "radio stations" in the plural. Thus, the

statements did not necessarily imply that more than one employee at KWOD was involved. Nor do the statements necessarily imply that the practice was known to KWOD's owner. Collins testified he was referring to KWOD's employees, not its owner, when he said "If you allow your station van [to be used for sex]" then you are an irresponsible broadcaster.

Thus, the jury was not required to draw the inferences sought by plaintiff as to how the "sex with minors" statements were understood.

Moreover, plaintiff fails to show that no substantial evidence supports the verdict on the basis of absence of malice.

We conclude substantial evidence supports the judgment.

IV. Negative Reputation Evidence

Plaintiff next contends the trial court erred in allowing, over his objection, admission of evidence of KWOD's poor

reputation, because such evidence is not allowed in slander per se cases, where injury to reputation is presumed. Plaintiff points out the trial court instructed the jury the "sex with minors" statements were slanderous per se, and plaintiff elected to forego actual damages and asked the jury to find the race-related statements were defamatory per se. We find no merit in plaintiff's contention.

On appeal plaintiff fails to specify what evidence he found objectionable. His trial court objection was made as a blanket objection outside of the presence of the jury, before the defense introduced any evidence of KWOD's poor reputation. Since plaintiff fails to cite any specific evidence, we are unable to determine whether there is any reversible error. (Evid. Code, § 353, subd. (b) [judgment will not be reversed for erroneous admission of evidence unless appellate court determines error

resulted in miscarriage of justice].)

Moreover, the contention is otherwise without merit.

Plaintiff cites inter alia *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, for the proposition that "where []the utterance is slanderous *per se*, damages are presumed and evidence tending to show lack of injury to the reputation is inadmissible." (143 Cal.App.2d at p. 448.)

However, assuming for the sake of argument that the cited rule is still valid (which defendants dispute), the rule would not bar admission of the evidence in this case.

Thus, the rule relied upon by plaintiff anticipates that neither side will put on any evidence of injury to the plaintiff's reputation. Here, during trial plaintiff informed the court his trial theory would be limited to slander per se, i.e., he would not seek actual damages but would ask the

jury to find the race-related statements slanderous per se, such that general damages would be presumed. However, plaintiff did not inform the court of this decision until midtrial, after he had already put in some evidence of KWOD's good reputation, including reference to an FCC report applauding KWOD's "stellar performance ... meritorious performance in the public interest...."

In ruling that defendants could introduce evidence of KWOD's poor reputation, the trial court stated it had previously been informed of plaintiff's desire to put in evidence of KWOD's good reputation and had indicated to plaintiff that if he did so, the court would allow defendants to introduce evidence of KWOD's poor reputation in rebuttal. The trial court consequently allowed the defense to put in evidence to rebut plaintiff's evidence.

Fundamental fairness supports the trial

court's decision.

Plaintiff cites only one case in which the plaintiff put on evidence of injury to reputation--*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991. Plaintiff appears to believe *Weller* allows plaintiffs but not defendants to put on evidence regarding the plaintiff's reputation. However, no issue regarding admission of defense evidence was presented in *Weller*. The issue before the appellate court was whether a jury award for both proven general damages and presumed general damages constituted an impermissible double recovery. (232 Ca.App.3d at pp. 1011-1015.) The court concluded the verdict was not a double recovery. A plaintiff may be able to prove some but not all damage and is entitled to recover presumed general damages for that component of injury to reputation which is difficult to prove. (232 Cal.App.3d at p. 1014.) The court also

rejected the contention that presumed damages may be recovered only in the absence of proven injury to reputation. (232 Cal.App.3d at pp. 1014-1015.) Thus, *Weller* has no bearing on this case.

We conclude plaintiff fails to show any reversible error in admission of evidence of plaintiff's poor reputation.

V. Slander Per Se

Plaintiff contends the trial court erred in allowed the jury to determine whether the race-related statements were defamatory because they were slanderous per se under Civil Code, section 46,3/ as tending to

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3/ Civil Code section 46 provides in part: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime... [¶] 3. Tends directly to injury him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly required, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits ... [¶] 5. Which, by natural consequence, causes actual damage."

or directly injury his business. As indicated, the jury was asked to decide whether the race-related statements were slanderous per se.

Plaintiff relies on *MacLeod, supra*, 52 Cal.2d 536, which held that where a statement is unambiguous, the trial court must determine as a matter of law whether it is defamatory on its face. (*Id.* at p. 546.)

Here, however, contrary to plaintiff's contention, the race-related statements did not unambiguously state that KWOD had actually made on-the-air racial slurs. Rather, the statements were couched in terms that (1) "[t]he radio station should be part of your life to educate you and it shouldn't, in fact, promote [racial intolerance or violence]"; (2) "[i]t's so bad when people hear on the radio [racial slurs]"; (3) "a snot-nosed runty little punk who thinks his ego can run the radio station, goes on and calls people [racial

slurs]; and (4) "I don't think a[] []responsible act is for a manager of a radio station to allow [racial slurs]."

None of these statements unambiguously asserted as fact that KWOD made on-the-air racial slurs. The trial court did not err in letting the jury decide whether the remarks were slanderous per se.

Moreover, assuming for the sake of argument that the trial court should have found the statements to be slanderous per se, plaintiff fails to show any basis for reversal of the judgment. (Cal. Const, art. VI, § 13; Code Civ. Proc., §475 [disregard of nonprejudicial error].) When an issue proceeds to trial and the losing party complains he should have prevailed in pretrial proceedings, it is not enough to show the pretrial ruling was erroneous. The appellant must also show resulting prejudice and the probability of a more favorable outcome at trial. (Waller v. TJD, Inc.

(1993) 12 Cal.App.4th 830, 833 [litigant not prejudiced by having issue submitted to jury rather than be resolved by summary judgment]; accord, *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195.)

Here, the plaintiff fails to make any showing of prejudice or the probability of a more favorable outcome at trial.

We conclude plaintiff has failed to demonstrate reversible error.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

(CERTIFIED FOR PARTIAL PUBLICATION)

SIMS, J.

We concur:

PUGLIA, P.J.

SPARKS, J.

Third Appellate District No. C016759

S044146

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

EDWARD R. STOLZ II, Appellant

v.

K S F M 102 F M Et Al., Respondents

Petition for review DENIED.

SUPREME COURT
FILED
FEB 16 1995
Robert Wandruff Clerk

DEPUTY

LUCAS
Chief Justice

(2)

No. 94-2049

Supreme Court, U.S.
FILED
JUL 12 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

EDWARD ROYCE STOLZ II, dba KWOD 106.5 FM,

Petitioner,

vs.

KSFM 102 FM, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED

1. ARE THERE SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE STATE COURT'S RULING THAT THE PETITIONER RADIO STATION IS A PUBLIC FIGURE?

2. ARE THERE SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE STATE COURT'S RULING THAT THE BROADCAST AT ISSUE WAS ON A MATTER OF PUBLIC CONCERN?

3. ARE THERE SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE STATE COURT'S RULING THAT THE PETITIONER RADIO STATION OWNER IS A PUBLIC FIGURE?

LIST OF PARTIES TO THE PROCEEDINGS

Appellant is Edward Royce Stolz, II, doing business as KWOD 106.5 FM.

Respondents are KSFM 102 FM., Genesis Broadcasting, Inc., Booth American, Inc., and Timothy Anderson, also known as Chris Collins.

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APPENDIX

Appendix 1 — Petition for Review before the Supreme Court of the State of California . A-1

No. 94-2049

In The

Supreme Court of the United States

October Term, 1994

EDWARD ROYCE STOLZ II, dba KWOD 106.5 FM,

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KSFM 102 FM, et al.,

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On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

Petitioner Edward R. Stolz, II, doing business as KWOD 106.5 FM ("Petitioner"), petitions for certiorari from the California Supreme Court's denial of a petition for review of a partially published opinion in the Third District Court of Appeals for the State of California, upholding a unanimous jury verdict in the Sacramento County Superior Court awarding judgment to Respondents and denying Petitioner recovery.

The underlying case was a defamation lawsuit brought on behalf of radio station KWOD 106.5 FM ("KWOD") by its sole owner, Edward R. Stolz, II ("Stolz"). The defendants were Sacramento radio station KSFM 102 ("KSFM") and its parent corporation, Genesis Broadcasting Company ("Genesis"), as well as a radio personality from KSFM, Chris Collins ("Collins"), all of whom were Respondents in the California Court of Appeals and California Supreme Court actions and are answering the petition herein.

The lawsuit was based on a particular broadcast of the KSFM "morning zoo" in which Collins and his morning show co-hosts invited audience discussion and comments regarding what they perceived to be irresponsible broadcasting arising out of a homophobic "gay bashing" broadcast on KWOD.

Trial of the case began on June 28, 1993, with extensive discussion of pre-trial motions and issues of law.

The actual jury trial began on June 29, 1993, and ended on July 15, 1993, with the unanimous verdict awarding Respondents a judgment and giving Petitioner nothing. Reporter's Transcript ("R.T.") at 1149:12-15.

Petitioner appealed to the Third District Court of Appeals, citing several bases for error. The most significant basis, and the issue addressed by the appellate court in the published portion of its opinion, had to do with the trial court's ruling that plaintiff/appellant/petitioner was a public figure, and therefore, had to prove actual malice in order to recover damages. On appeal, the issue was thoroughly briefed and oral argument presented. After completion of oral argument, the Third District Court of Appeals issued its partially published opinion on November 18, 1994. *Stolz v. KSFM 102*, 30 Cal.App.4th 195 (1994). A copy of the entire opinion is attached as Appendix A to the Petition for Certiorari.

Thereafter, Petitioner filed a Petition for Review to the California Supreme Court in which he sought review of two of the three issues presented herein.[1] A true and correct copy of the Petition for Review is attached as Appendix 1 hereto. The California Supreme Court, sitting en banc, summarily denied review on February 16, 1995. The denial of the Petition for Review is attached as Appendix B to the Petition for Certiorari.

---

[1] The Petition for Review did not address the third issue presented herein, i.e., whether the owner of a radio station is a limited purpose public figure.

Respondents are mindful of the admonition of Supreme Court Rule 15.1 and the request for brevity in Rule 24. However, the Petition for Certiorari contains few facts concerning events leading up to the allegedly defamatory broadcast. Those events, and the context in which the allegedly defamatory remarks were made, are crucial to the Court's analysis. Respondents must, therefore, provide a more detailed factual background.

In June 1989, KSFM operated on a "contemporary hits" format at 102 on the FM radio dial in Sacramento. R.T. at 239:18-240:8, 310:16-26. KWOD was also a contemporary hits radio station located at 106.5 on the FM radio dial in Sacramento. R.T. at 377:21-26, 378:10-18, 379:10-11, 424:3-11. Stolz was the owner and general manager of KWOD and played an active role in its day-to-day operations. R.T. at 393:12-16, 393:19-22, 378:10-20. His duties included: supervision of all department heads (R.T. 393:12-16, 393:23-27); overseeing financial affairs, promotions and programming (R.T. 393:23-27); chief engineer (R.T. 380:22-381:11); hiring, firing, and discipline of employees (R.T. 391:21-392:6, 397:16-398:9, 957:10-958:2, 447:18-448:7); ensuring his station adhered to Federal Communications Commission Regulations and community standards (R.T. 395:14-22, 438:5-13, 439:13-21, 462:14-22, 464:14-465:2, 467:20-27); overseeing advertising and national sales work (R.T. 971:12-18, 987:16-988:16, 989:17-22); and determining listener preferences (R.T. 627:15-22). He characterized himself as an active owner and manager who was on the premises daily. R.T. 381:21-23, 467:11-27. He also admitted he was responsible for all policy decisions at KWOD. R.T. 447:18-448:7.

On about June 13, 1989, KWOD disc jockey Pat Garrett ("Garrett"), while on the air, complained to his listeners that his girlfriend had just left him for a guy named Bruce. R.T. 413:12-417:22, 675:19-676:4, 812:2-814:17, 919:4-24. Garrett went on to state that being named Bruce undoubtedly meant the guy was a "limp-wristed queer." R.T. 812:2-814:17. Garrett then made other derogatory, homophobic comments and encouraged his listeners to call KWOD with similar comments. R.T. 451:6-452:18.

Several leaders of the Sacramento gay community learned of the KWOD broadcast and tuned in KWOD to monitor Garrett's comments. R.T. at 919:4-24. One leader, Everett Denman, was so upset by Garrett's actions that he organized a petition drive, gathering several hundred signatures on a petition to boycott KWOD and its advertisers. R.T. at 891:14-892:17, 931:25-932:8. In addition, several members of the gay community called KWOD to express their outrage. R.T. at 920:8-922:2. At least one of them was told that she was the only person who called. R.T. at 921:22-922:2. In fact, she was told to "take a chill pill, babe." R.T. 920:8-28.

Community concern over the Garrett broadcast was widespread. In late June, an article appeared in the *Sacramento News and Review*, stating that Garrett's broadcast "inflamed the gay community." Defendant's Trial Exhibit A, Chronological Index for Original File in Lieu of Clerk's

Transcript ("CI") at page 510. At about the same time, a local gay community publication called "Mom . . . Guess What!" published a similar article. Defendant's Trial Exhibit I, CI at page 512. Also, the Lee Nichols Show, on radio station KFBK devoted an afternoon to the issue. R.T. at 626:8-21, 817:11-22.

Alerted by the *Sacramento News and Review* article, Collins believed he would receive significant inquiry from his listeners regarding the Garrett broadcast. R.T. at 302:13-303:19, 305:20-25. He discussed the matter with KSFM program director Brian White, who gave Collins permission to discuss the Garrett broadcast on the Morning Zoo if there was a significant amount of caller interest. R.T. at 305:17-306:15. The Morning Zoo was, in 1989, an entertainment and information program on a contemporary hits format. Collins was the primary host, with several other personalities joining him. In addition to playing music, the program was designed to inform and educate its young audience on social, political and economic issues of the day. R.T. at 299:1-301:7.

On the morning of June 30, 1989, Collins received numerous phone calls from outraged listeners concerned about the Garrett broadcast. R.T. at 306:16-307:8. Collins felt this was a significant amount of interest. Further, he was aware that KWOD's management initially refused to admit that homophobic comments had been made. R.T. at 260:4-21, 315:13-316:6. He therefore decided to do a broadcast focused on racial intolerance and management's irresponsibility for allowing such conduct to occur over the airways. R.T. at 307:9-308:10.

For approximately 2½ hours, the Morning Zoo cast took listener phone calls and focused their attention on the irresponsibility of broadcasters such as KWOD who would engage in irresponsible acts and then deny responsibility. Broadcast transcript, plaintiff's trial Exhibit 2, CI at 516.

A. THE KSFM BROADCAST

During the KSFM broadcast, a caller stated he had called KWOD, compared the homophobic comments to racist comments, and defied the KWOD disc jockey to utter racial epithets such as "nigger" or "jungle bunny" on the air. According to the caller, a KWOD disc jockey then accepted the challenge, stating that he would, on a future show, utter such racial slurs over the air. Again offended by these comments, Collins cited such conduct as an example of irresponsible broadcasting. Plaintiff's trial Exhibit 2, pp. 2-3, CI at 516; R.T. at 254:8-255:11.

Toward the end of the broadcast, Collins stated that it was also irresponsible for radio station management to allow its employees to use the station van to engage in sex acts with underage females. Plaintiff's trial Exhibit 2, p. 38, CI at 516. Prior to the broadcast, Collins had heard reports from several people that in fact such liaisons had occurred. R.T. at 243:10-16, 245:25-246:20, 253:4-254:4. After briefly citing these incidents on the air as further examples of irresponsible management practices at a radio station, Collins encouraged listeners to write to the Federal Communications Commission to complain about the homophobic comments. Plaintiff's trial Exhibit 2, pp. 38-40, CI at 516.

B. KWOD REACTS TO GAY PROTESTS

Galvanized by the homophobic Garrett broadcast, gay community leaders forced KWOD to a meeting before the Sacramento Human Rights and Fair Housing Commission on July 7, 1989. R.T. at 894:15-21, 930:25-931:3.

KWOD's representative at that meeting, Bob Ryder, initially stated he could not believe the community reaction was so negative given the allegedly innocuous nature of Garrett's comment. He then gave the Webster's Dictionary definition of the word "faggot" as "a bundle of sticks or twigs." This further incensed the gay leaders. Finally, Ryder backed down and agreed to publish an apology in local gay publications and on the air. Ryder balked, however, at a demand to fire Garrett. R.T. at 823:5-825:12, 894:15-896:28, 930:25-934:13.

On July 13, 1989, Garrett apologized on the air for his comments. KWOD also paid for a ½-page advertisement published in a gay and lesbian community news publication. R.T. at 824:28-825:8.

II

SUMMARY OF ARGUMENT

The state court correctly applied existing law in holding that a radio station which has ample media access and has actively sought the public's attention is a public figure.

The state court correctly ruled that two statements woven into a 2½-hour radio broadcast on the topic of broadcaster irresponsibility must be accorded "breathing space" and given constitutional protection.

Finally, the state court correctly applied existing law in holding that an activist radio station owner involved in all important aspects of the station's operation is a public figure.

III

ARGUMENT

A. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE STATE COURT'S RULING THAT THE PETITIONER RADIO STATION IS A PUBLIC FIGURE

Petitioner first takes issue with the California Court of Appeal's ruling that KWOD is a public figure. Petition for Certiorari ("Petition") 24-34; Appendix A-17 through A-22. Essentially, the lower court held:

> This record sufficiently demonstrates that KWOD is an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast.

(Citation omitted.) A-21.

In making this determination, the lower court found two factors significant. First, KWOD actively sought public attention and thereby "thrusts itself into the public eye on a daily basis." A-21. Second, as a member of the media, KWOD had access to effective self-help mechanisms and therefore, ". . . is less vulnerable to injury from defamation . . . ." A-21 to A-22.

The two articulated factors are nothing new to constitutional jurisprudence. They were first definitely stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-345 (1974), and have been consistently applied by both state and federal courts since then. *C.F. Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), cert. den. 449 U.S. 898 (1980); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), cert. den. 452 U.S. 962 (1981); *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976); *Reader's Digest Association v. Superior Court*, 37 Cal.3d 244, 253 (1984).

Having established that the lower court correctly articulated the public figure factors, the only issue left on this topic is whether there are special and important reasons for this court to review the lower court's application of the facts to the law. There are not.

The court's application of the facts to the "media access" issue can be summarily approved. Petitioner is a member of the media. Its owner referred to KWOD as a 50,000 watt radio station which had a wide broadcast range

in the Sacramento area. R.T. at 651:15-653:3. Clearly, Petitioner had ample access to effective self-help remedies such as either denying Respondent's charges or apologizing to the listening audience for the gay-bashing broadcast.

As for whether Petitioner thrusts itself into the public eye, the record is replete with evidence that KWOD actively sought public attention. Petitioner is correct in saying KWOD's public service record was emphasized by the lower court. A19-20. However, the lower court also discussed: (1) the wide broadcast range of KWOD as a long-established 50,000 watt station (R.T. at 651:15-653:3; A-17 through A-18); (2) Stolz's admission that KWOD is "well-known to the public" (R.T. at 650:16-21; A-18); (3) Stolz's promotion of KWOD as "the number 1 hit music station" (R.T. at 651:15-653:3; A-18); (4) a *Sacramento News and Review* article naming KWOD "Sacramento's best radio station" (A-18); and (5) "KWOD's pervasive power and influence on community affairs" as witnessed by Stolz's testimony that KWOD "is there for the purpose of entertaining and informing the public and hopefully committing to a degree of community service" (R.T. at 398:6-9, A-18).[2]

Petitioner's emphasis on the court's interest in KWOD's public service record is disingenuous. The fact that all radio stations are required by the Federal Communications Commission to participate in such activities does nothing to

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[2] The trial record also reveals Stolz's extensive efforts to advertise his radio station, thereby seeking public attention. R.T. at 937:25-950:4.

defeat the public figure analysis. The key is that the public generally sees KWOD as helping the community and taking an active role in community affairs. KWOD does reap some benefit from this in that its reputation is enhanced. In fact, Stolz himself actively encouraged this notion of KWOD's good reputation when he testified at trial about the "variety of good works in the community" which his station performs. R.T. at 432:13-16, 438:9-12. Further, Stolz testified that his station does even more public service work than most radio stations. R.T. at 634:7-14; A-19. Having placed all of this evidence into the record, Petitioner cannot argue that the lower court went beyond the bounds of reason in citing this evidence in support of its finding Petitioner is a public figure.

Petitioner emphatically states that the lower court's decision herein, coupled with the rise of so-called "tabloid journalism," will result in a media feeding frenzy, in which various members of the media will attack each other without fear of liability for defamation. Petition at 22.

In point of fact, the lower court's decision ensures a media plaintiff will be given the same opportunity to recover as any other person or entity with a great deal of influence over public opinion: recovery predicated upon proof of actual malice. Where, as here, a radio station or other member of the media invites attention on itself, it is also inviting scrutiny. Where, as here, the station asks the public to listen to its music, advertisements, and comments, it cannot be heard to complain when the public pays close attention to, and questions the validity of, what the station says. If the First Amendment and cases interpreting it mean anything, it is that

those who seek to hold sway over public opinion, be they politicians or journalists, must be subject to careful scrutiny by the press and public. The lower court's decision reinforces that tradition.

B. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO REVIEW THE STATE COURT'S RULING THAT THE RESPONDENT'S BROADCAST, TAKEN AS A WHOLE, WAS ON A MATTER OF PUBLIC CONCERN

Petitioner next argues that because the "sex in the van" statements regarding it would not be of public concern if uttered by themselves, they should not be given enhanced protection as to the burden of proof simply because they were uttered in a larger broadcast which was on a matter of public concern, i.e., broadcaster responsibility. Petition at pp. 27-28. Petitioner goes on to state that the lower court disregarded established law in ruling that these statements were entitled to "breathing space" and were part of the larger broadcast on broadcaster responsibility. Petition at pp. 28-29.

In fact, the lower court's ruling was a logical application of this Court's recent rulings on the topic. Essentially, Petitioner's argument is that it should be allowed to pull a couple of brief statements made only a few seconds apart from a 2½ hour broadcast, take them out of context, and place the burden of proving falsity on the media defendant.

Petitioner's argument is contrary to established law of this Court. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 761 (1985), this Court held that it must examine the entire record and review the statement's content, form and context before it can determine whether the statement is on a matter of public concern. That is precisely the process followed by the lower court in this case. A-27 through A-28.

This Court has often held that because free speech is so highly revered, a certain amount of erroneous speech is inevitable and must be protected. *New York Times Company v. Sullivan*, 376 U.S. 271, 272 (1964); *St. Amant v. Thompson*, 39 U.S. 727, 731-732 (1968); *Herbert v. Lando*, 441 U.S. 153, 171-172 (1979). The principle has been succinctly stated as follows:

> The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Gertz v. Robert Welch, Inc., *supra*, 418 U.S. at p. 341.

The lower court followed these principles in holding that the "sex in the van" statements were deserving of protection because they were within the "breathing space" which must be given a media defendant in making a broadcast which is on a matter of public concern. A-28 through A-29.

Certainly, the "sex in the van" statements must be considered within the "breathing space" allowed speech concerning broadcaster responsibility. A public figure's

personal conduct is germane to his public life and may properly be the subject of media scrutiny. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at pp. 344-345; *Waldbaum v. Fairchild Publications, Inc.*, *supra*, 627 F.2d at p. 1298, fn. 33. Certainly a radio station which appeals to a wide and youthful audience has a responsibility to ensure its broadcast content and the actions of its employees adhere to public values. No doubt the parents of KWOD's teenage audience would consider it irresponsible for Petitioner to allow its employees to use the station van for sexual liaisons with underage females. The lower court's ruling reinforces this Motion and does nothing to expand or distort existing law.

C. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE STATE COURT'S RULING THAT PETITIONER STOLZ IS A PUBLIC FIGURE

Petitioner Stolz next argues that he is simply an executive in the business which, in and of itself, is not sufficient to make him a public figure.[3] He cites *Waldbaum v. Fairchild Publications, Inc.*, *supra*, 627 F.2d at page 1299 for this proposition. Petition at pp. 29-30.

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[3] Petitioner did not make this argument when he filed his petition for review to the California Supreme Court. See Appendix 1.

Petitioner's argument is accurate as far as it goes. However, the *Waldbaum* case itself stands for the proposition that where, as here, the business executive is "the mover and shaper" of the business, he may indeed be considered a public figure. *Id.* at pp. 1299-1300.

The lower court correctly applied the law. Stolz is inextricably bound to the radio station as its sole owner, chief engineer, and general manager. He certainly considers the station to be his alter ego as witnessed by the fact that the case was originally captioned "Edward R. Stolz II, dba KWOD 106.5 . . . ."[4] His testimony established Stolz as a "hands-on" owner who played an active role in the station's day-to-day operations, including advertising, programming, engineering, public relations, employee relations, and financial affairs. As such, he was at least as powerful within the business as Mr. Waldbaum was in the Greenbelt Consumer Services Cooperative.

Further, as the supreme commander at KWOD, Stolz clearly had the media access necessary to rebut any defamatory statements, and therefore, was not "more vulnerable to injury"

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[4] The case when tried to the Sacramento County Superior Court was captioned "Edward R. Stolz II, dba KWOD 106.5 FM v. KSFM 102, et al." Subsequent captions at the Third District Court of Appeals, the California Supreme Court and this honorable Court have simply styled the case "Edward R. Stolz II v. KSFM 102, et al."

under the standard articulated in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at page 394. The lower court's ruling is not a departure from existing law, but rather a reasoned and considered application of existing law to the facts of this case.

IV

CONCLUSION

Respondents respectfully submit that the state court's ruling was correct and that this case presents no issue appropriate for the Court's review. They therefore pray that this Court will deny the Petition for Writ of Certiorari.

Dated: July 10, 1995

Respectfully submitted,

HARDY ERICH BROWN & WILSON
A Professional Corporation

By: _____
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CASE NO.

IN THE

SUPREME COURT OF CALIFORNIA

EDWARD ROYCE STOLZ 11,

PLAINTIFF AND APPELLANT,

vs.

KSFM 102 FM2

DEFENDANTS AND RESPONDENTS.

After a Decision by The Court of Appeal
Third Appellate District
[Case No. 3 Civil C016759]

PETITION FOR REVIEW

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CASE NO.

IN THE

SUPREME COURT OF CALIFORNIA

EDWARD ROYCE STOLZ II,

PLAINTIFF AND APPELLANT,

vs.

KSFM 102 FM2

DEFENDANTS AND RESPONDENTS.

PETITION FOR REVIEW

I.

ISSUES PRESENTED

1. DOES THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER AUTOMATICALLY MAKE HIM A PUBLIC FIGURE SHIFTING THE BURDEN OF PROOF TO PROVE THE FALSITY OF THE STATEMENT AND REQUIRING A SHOWING BY CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE MERELY BECAUSE AS A BROADCASTER HE HAS THE ABILITY TO REBUT THE STATEMENT.

2. DOES THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER AUTOMATICALLY MAKE ANY SUBJECT IT IS SLANDERED ABOUT OF PUBLIC CONCERN SHIFTING THE BURDEN OF PROOF AS STATED ABOVE IN ISSUE NO. 1 MERELY BECAUSE ANYTHING SAID ABOUT A BROADCASTER IS OF PUBLIC CONCERN SINCE RESPONSIBILITY IN BROADCASTING IS OF PUBLIC CONCERN.

3. WHAT IS THE STANDARD FOR REVIEW ON APPEAL OF A TRIAL COURTS RULING ON THE ISSUE OF WHETHER THE PLAINTIFF IS A PUBLIC FIGURE.

II.

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. THE UNDERLYING CLAIM

This Sacramento County Superior Court action was based upon a Third Amended Complaint for slander alleging that respondent broadcast over the air on June 30, 1989, slanderous statements about plaintiff's radio station that appellant's employees were having sex in the back of the appellant's van with underage girls and that appellants had broadcast derogatory remarks about Blacks calling them "niggers" and "jungle bunnies." (C.T. 113-125.)

During the broadcast, respondent's employees made slanderous statements regarding KWOD 105.FM, naming the station personally by its call letters and making reference to its owner. The alleged defamatory statements instructed on by the court made by defendants during the broadcast included the following: (R.T. 1011:10-28; 1012:1-24.)

> If you allow your station van to allegedly have underage girls in it performing sex with members of your staff which allegedly has happened with other radio station in town then you are an irresponsible broadcaster no matter what it is.
>
> If yours is a station that has people with underage girls screwing them in the back of a van.
>
> The radio should be part of your life to educate you and is [*sic*] shouldn't in fact promote violence within you to go out and beat up people such as Gays, Blacks because they happen to be Gay or Black.
>
> It's so bad when people hear on the radio 'ya, you're nothing but a nigger.'
>
> Instead, a snot nose runty little punk who thinks his ego can rung [*sic*] the radio station goes on and calls ... Black people niggers and jungle bunnies.

> I don't think a responsible act is for a manager of a radio station to allow a gentleman to call ... Black people nigger and jungle bunnies.

The court instructed that as a matter of law, the two statements regarding "sex in the back of the van" were slander per se (i.e., defamatory on their face) (R.T. 1011:10-21) and the others were left up to the jury to determine if they were defamatory on their face. (R.T. 1012:3-5.)

During defendants broadcast they repeatedly stated that their statements were in reference to a broadcast made by KWOD disc jockey Pat Garrett on June 13, 1989, in which derogatory statements were made regarding homosexuals. (R.T. 255:12-18.) However, the Garrett broadcast made no reference whatsoever to Blacks. (R.T. 255:12-18.) Nevertheless, the defendant's broadcast made several statements attributed to KWOD and to its employees alleging KWOD made derogatory statement about promotion of violence upon Blacks. (R.T. 240:21-28; 241:1-29.) Defendants' broadcast on two occasions also stated that appellant was allowing underage girls to have sex with his employees in the back of the KWOD van. (R.T. 244:7-23.) These statements directly imply Mr. Stolz as owner and manager was personally aware of this alleged activity taking place in the back of his van, that this activity was taking place at or about the time of the broadcast in 1989 or during the time period shortly before. Defendant's disc jockey admitted that his only knowledge of sex in the back of the KWOD van was a statement made to him by a former KWOD employee in 1985 that he had been involved in such an act in the early 1980's. (R.T. 245:5-28; 246-248.)

B. THE SACRAMENTO COUNTY SUPERIOR COURT JUDGMENT AFTER TRIAL BY JURY IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF

A jury trial was held and judgment was entered for defendant.

C. THE COURT OF APPEAL'S OPINION AFFIRMING THE JUDGMENT.

The Court of Appeal affirmed the judgment. The court held that plaintiff was a public figure and that the issue he was allegedly slandered about was of public concern.

III.

WHY REVIEW SHOULD BE GRANTED

A. ISSUE NOS. 1 AND 2.

The Court of Appeal in the published portion of its opinion held hat [*sic*] Appellant wa [*sic*] an "all purpose public figure" and that the subject of the slanderous statements were of "public concern."

Review should be granted to decide whether the definition of a "public figure" and interpretation of what is of "public concern" should be expanded to the degree expressed in the published portion of the Appellate opinion. The thrust of the opinion appears to be that merely because plaintiff is a radio broadcaster and as such has access to rebut slanderous statements this automatically makes him a public figure. The opinion detailed on page 10 and 11 plaintiff's testimony of

how popular his station is and all the community services it performs. However, all radio stations are known to some segment of population. Furthermore, it is common knowledge that all broadcasters provide airtime for public messages and public affairs programming. All broadcasters allow for such time because in their license renewal applications with the FCC they are required to set forth what good deeds they have done for their community. The litany of good deeds set forth by plaintiff regarding his station could likely be matched by any broadcaster in the same or other ways. The appellate court in its published portion has set forth a precedence never reached by any other court by literally making all broadcasters "public figures." Although the point of this Petition is not to argue whether this is correct or not it appears to be a crucial issue worthy of review because of its impact on every broadcaster in this state from the national networks on down to the local college stations. Due to First Amendment considerations should a broadcaster be automatically subject to the shifting of the burden of proof and the higher standard of proving "actual malice"?

This appellate decision could make slander against broadcasters a more common occurrence because they would have to prove falsity and actual malice (actual knowledge of falsity or reckless disregard of the truth). The media in this country is the primary promulgator of what is supposed to be the truth. Lately with tabloid journalism that even the major networks seem to be stooping to in sensational cases this idealism has come into question. This court should consider whether these broadcasters themselves will be subject to slander by other broadcasters knowing that the slandered broadcaster will have the burden to prove the falsity with actual malice. Again without trying to argue the point has our

society reached the point that a free for all against the media is acceptable or should one who slanders a media plaintiff still be required to prove up its statements.

The appellate court also held that the defamatory speech involved matters of public concern. The appellate court stated that the thrust of the entire radio program at issue was over broadcaster responsibility and that the "sex in the van with minors" statements which the trial court held were slander per se were somehow bound up in this subject and therefore subject to freedom of expression's "breathing space." The crucial issue here is whether a slanderous statement suddenly becomes a matter of "public concern" when it is spoken in a larger context of a related subject.

If defendant's broadcast had never discussed radio station responsibility but between songs came out and said plaintiff was allowing its van to be used by employees to have sex with minors would that suddenly become of "public concern," particularly here where plaintiff had never interjected itself in any way on this issue over the air or in any public way.

This court should decide whether a slanderous statement is no longer actionable merely because it is discussed within the context of a broader subject.

B. ISSUE NO. 3

This court should consider what the standard of review is on appeal of a slander case. The appellate court citing the recent case of Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 933 states it is the substantial evidence test. However

the Supreme Court in McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 842 states it is the "de novo," independent review standard. Is McCoy no longer the law?

IV.

LEGAL DISCUSSION

1. DOES THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER AUTOMATICALLY MAKE HIM A PUBLIC FIGURE SHIFTING THE BURDEN OF PROOF TO PROVE THE FALSITY OF THE STATEMENT AND REQUIRING A SHOWING BY CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE MERELY BECAUSE AS A BROADCASTER HE HAS THE ABILITY TO REBUT THE STATEMENT.

In the case of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, the court in emphasizing the importance of free expression and a free press under the First Amendment determined that public officials may not prevail in an action for libel relating to their official conduct unless proof that the statement was made was with "actual malice." Later, in *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, the court held that "public figures" like public officials must also prove actual malice in order to recover in a defamation action. Later in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, the court defined two classes of public figures, one being the "all purpose" public figure who has achieved such pervasive fame and notoriety that he becomes a public figure for all purposes and in all contexts, and a "limited purpose" or "vortex" public

figure, an individual who voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of purposes. (418 U.S. at 351.) The California Supreme Court in *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 253-254, stated that:

> Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy.

In *Reader's Digest* the court went on to hold at 37 Cal. 3d at 254:

> The cases decided since New *York Times* and *Gertz* make it clear that a person or a group should not be considered a 'public figure' solely because that person or group is a criminal defendant (citation omitted); has sought certain relief through the courts (citation omitted); or merely happens to be involved in a controversy that is newsworthy (citation omitted). Rather as this court recognized in *Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal. 3d 763, a 'public figure' plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issue involved. As such the mere involvement of a person in a matter which the

> media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action.
>
> In sum, when called upon to make a determination of public figure status, court should look for actions of affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies.

The court in *Reader's Digest* appeared to take a restrictive approach on who would be deemed a "public figure." The individual must have thrust himself into a particular public controversy, not just any matter of public concern. In the instant action the Court of Appeal recited testimony by the plaintiff on page 10 and 11 of its opinion as to how its station is the best in Sacramento and has been involved in a great deal of community service and addressed various public programming issues such as youth suicides, medical issues, and consumer affairs. Furthermore, the court went on to state how plaintiff testified regarding being involved in fund raising events for the March of Dimes, etc. These factors led the court to conclude that "KWOD is an all purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast." (Page 11 of Appellate Opinion.) None of these good deed however appear to have anything to do with the particular issue of alleged defamation being, particularly, the sex in the van with minors issue. In *Reader's Digest* the court made specific reference to the individual having thrust itself

into the forefront of the "particular public controversy." (37 Cal. 3d at 255.)

However the court in *Reader's Digest* citing the *Gertz* case stated at 37 Cal.3d at 253:

> First, it recognizes that public figures are generally less vulnerable to injury from defamation because of their ability to resort to 'self help.' Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements.

Here admittedly, plaintiff is a broadcaster and at least to the extent is has the ability to use self help in rebutting slanderous statements on its own airwaves has access to some form of communication. Therefore, in the circumstance that plaintiff has not voluntarily injected itself into a particularly public controversy but nevertheless has the ability to rebut a slanderous statement because it itself is a broadcaster, does that mean that injecting itself into the public controversy test is irrelevant if the slandered party is a broadcaster? Also, does the fact a broadcaster have the ability to rebut slanderous statements on its own station mean that it automatically has the ability to cause other media, including television and radio stations to rebut these allegations. This court in the case of *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, shied away from giving media defendants protection. The court stated at 48 Cal. 3d at 742:

> The news media contend the threat of defamation actions has a 'chilling effect' on their willingness to report the news. Stated conversely, the argument is that obstacles to recovery for defamation increase the media's ability to report the news. 'The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.... Yet absolute protection for the communication media requires a total sacrifice of the competing value served by the law of defamation.' *Gertz*, *supra*, 418 U.S. at p. 341. There must be a 'proper accommodation between the law of defamation of speech and press' (Citation omitted.)

In the *Brown* case the court also stated at 48 Cal. 3d at 744, "A person is not a public figure merely because he happens to be involved in a controversy that is newsworthy." The court in *Brown* also held at 48 Cal. 3d at 7 48:

> We reject the news media's contention that a negligence standard will subject them to such self-exacting scrutiny that it will have a 'chilling effect' on the free flow of information. This argument is speculative. Its implicit premise is that if a news media business can be held responsible for its falsehoods, it will be

> less likely to report the news. This suggests that the news media's only reason to be accurate is to avoid legal liability.

Here, considering that the court of appeal certified for partial publication the section concerning the issue of the test for public figurehood, it appears to have given a media defendant an additional form of protection when its defamatory statements are against another media defendant even though that media defendant has not injected itself into the particular controversy. Therefore, appellant asks this court to accept the petition for review to decide whether the mere fact that a slandered plaintiff is a broadcaster will on its own, regardless of whether plaintiff itself in a public controversy subject it to the shifting of the burden of proof and the establishing of the actual malice standard.

2. DOES THE FACT THAT A SLANDERED PLAINTIFF IS A RADIO BROADCASTER AUTOMATICALLY MAKE ANY SUBJECT IT IS SLANDERED ABOUT OF PUBLIC CONCERN SHIFTING THE BURDEN OF PROOF AS STATED ABOVE IN ISSUE NO. 1 MERELY BECAUSE ANYTHING SAID ABOUT A BROADCASTER IS OF PUBLIC CONCERN SINCE RESPONSIBILITY IN BROADCASTING IS OF PUBLIC CONCERN.

The Court of Appeal also held that when the speech is of public concern and plaintiff is a public figure, the Constitution requires the plaintiff to recover based upon the actual malice standard. (Page 15 of the Opinion.) The court went on to hold that although the gist of the radio broadcast

concerned responsibility by broadcasters that because freedom of expression requires breathing space that statements such as the ones concerning sex with minors in the van are still of public concern. As stated above the courts have been restrictive on declaring someone a public figure unless that individual injected himself into the particular controversy. Here although the issue of broadcasters' responsibility towards the public may have been of public concern as well as whether plaintiff had breached that public responsibility by making offensive statements regarding homosexuals, that is nevertheless not a stepping stone to a competitor making other defamatory statements particularly the ones decided by the court to be slander per se regarding sex in the van with minors.

3. WHAT IS THE STANDARD FOR REVIEW ON APPEAL OF A TRIAL COURT'S RULING ON THE ISSUE OF WHETHER THE PLAINTIFF IS A PUBLIC FIGURE.

On page 9 of the Appellate Opinion, the court stated that the public figure determination made by the trial court is to be reviewed based upon the "substantial evidence" test as set forth in the recent case of *Denney v. Lawrence* (1994) 22 Cal. App. 4th 927, 933. Although the appellate court cited the case of *McCoy v. Hearst Corp.* (1986) 42 Cal. 3d 835, the *McCoy* case clearly holds that there should be an independent review de novo by the appellate courts on the issue of whether the slandered party is a public figure. In *McCoy* the court held at 42 Cal. 3d at 842:

> Recently, in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, the court strongly reaffirmed the principle of independent review. The requirement of

> independent appellate review reiterated in *New York Times, Co. v. Sullivan* is a rule of federal constitutional law... It reflects a deeply held conviction that judges--in particularly Members of this Court--must exercise such a review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by any clear and convincing proof of 'actual malice.'

Therefore this Court should review whether the holding in *McCoy* is still valid or has it been supplanted by *Denney*.

Dated: July 6, 1994

JOHN S. SARGETIS
Attorney for Appellant
EDWARD ROYCE STOLZ, II

PROOF OF SERVICE

COUNTY OF SACRAMENTO, STATE OF CALIFORNIA:

I, John S. Sargetis, am employed in Sacramento County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 770 L Street, Ste. 1000, Sacramento, California 95814.

On December 28, 1994, I served the foregoing PETITION FOR REVIEW on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE SERVICE LIST BELOW

___ (BY MAIL) I caused such envelope with postage thereon to be placed in the United States mail at Sacramento, California.

xx (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

xx (State) I certified (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (Federal) I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on: December 28, 1994

_____
Signature of Declarant

SERVICE LIST

Court of Appeals
Third Appellant District
900 N Street, Room 400
Sacramento, CA 95814

Supreme Court
Library and Courts Building
900 N Street, Room 400
Sacramento, CA 95814

PROOF OF SERVICE

COUNTY OF SACRAMENTO, STATE OF CALIFORNIA:

I, John S. Sargetis, am employed in Sacramento County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 770 L Street, Ste. 1000, Sacramento, California 95814.

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xx (State) I certified (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (Federal) I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on: December 29, 1994

_____
Signature of Declarant

SERVICE LIST

Sacramento Superior Court
Honorable Gary S. Mullen
729 Ninth Street
Sacramento, CA 95814

Bruce E. Salenko
Hardy, Erich & Brown
1000 G Street, 2nd Floor
Sacramento, CA 95814

CERTIFIED FOR PARTIAL PUBLICATION*

COPY

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT
(Sacramento)

EDWARD R. STOLZ, II — C016759

Plaintiff and Appellant, — (Super. Ct. No. CV519825)

v.

KSFM 102 FM et al.,

Defendants and Respondants.

APPEAL from a judgment of the Superior Court of Sacramento County. Gary S. Mullen, Judge. Affirmed.

John S. Sargetis for Plaintiff and Appellant.

Hardy Erich Brown & Wilson and Bruce E. Salenko for Defendants and Respondents.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III, IV and V of the Discussion.

In this defamation action, plaintiff Edward R. Stolz II, doing business as KWOD 106.5 FM, appeals from a judgment upon a jury's verdict in favor of defendants KSFM 102 FM, Genesis Broadcasting Co., and Chris Collins. Plaintiff contends the trial court erred in (1) determining he is a public figure and the speech involved matters of public concern, (2) instructing the jury that to establish falsity of the allegedly defamatory statements the "gist" of the information must be false, (3) admitting negative evidence of plaintiff's reputation, and (4) failing to instruct the jury that certain statements were slanderous per se. Plaintiff also contends no substantial evidence supports the defense verdict.

In the published portion of this opinion we conclude the trial court correctly ruled plaintiff was a public figure and the speech involved matters of public concern. In an unpublished portion of the opinion, we reject plaintiff's remaining contentions of error. We shall therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the owner, operator, and general manager of radio station KWOD 106.5 FM in Sacramento, licensed and regulated by the Federal Communications Commission (FCC).

On June 13, 1989, KWOD disc jockey Pat Garrett made derogatory remarks about homosexuals on the air. He began by saying his girlfriend had left him for someone named Bruce, a name which undoubtedly belonged to a "limp-wristed queer," a "faggot." Garrett encouraged listeners to call in during the broadcast with similar comments. One caller stated words to the effect that all homosexuals should be killed.

The broadcast generated a reaction in the Sacramento community. An article in the *Sacramento News and Review* reported that KWOD's broadcast had inflamed the homosexual community, which was planning a boycott of KWOD and its advertisers. Another radio station, KFBK, devoted a program to the incident. In response to complaints from members of the homosexual community, a mediator from the Sacramento Human Rights and Fair Housing Commission met with KWOD representatives, who after some resistance ultimately broadcast an apology.

On June 30, 1989, Sacramento radio station KSFM made the incident the subject of an on-the-air discussion about irresponsible radio broadcasting during KSFM's "Morning Zoo" program. KSFM employees Chris Collins and Mike Reynolds specifically referred to KWOD as the subject of their comments, took calls from listeners during the two and a half hour program, and encouraged listeners to contact the FCC to complain about KWOD.

One caller stated he had called KWOD after KWOD's broadcast to complain the derogatory remarks about homosexuals were comparable to racist remarks such as "nigger" or "jungle bunny," which certainly would not be uttered on the air. According to the caller, the KWOD disc jockey said he accepted the challenge and would utter such racial slurs on the air in the future. Although the KWOD disc jockey did not make racist remarks on the air, this call to KSFM generated the following comments on the air by KSFM employees, *related to the issue of race*:

1. "The radio station should be part of your life to educate you and it shouldn't, in fact, promote violence within you to go out and beat up . . . people such as gays or blacks

because they happen to be gay or *black."* (Italics added.)

2. "It's so bad when people hear on the radio 'yeah, you faggot, you queer, *you're nothing but a Nigger.'"* (Italics added.)

3. "Instead, a snot-nosed runty little punk who thinks his ego can run the radio station, goes on and calls people faggot and queers, *and calls black people Niggers and jungle bunnies."* (Italics added.)

4. "I don't think a [ ] [ ] responsible act is for a manager of a radio station to allow a gentleman to call gay people faggots and queers and *to call black people niggers and jungle bunnies.'"* (Italics added.)

Toward the end of the Morning Zoo program, Collins also made the following comments on the air:

1. "[I]f you allow your station van to allegedly have underaged girls in it performing sex with members of your staff which allegedly has happened with other radio stations in town, then you are an irresponsible broadcaster no matter what it is."

2. "If yours is a station that has people with underaged girls screwing them in the back of the van."

The source of these references, as explained by Collins at trial, was a former KWOD employee, who in 1985 told Collins that while employed at KWOD he had on one occasion had sex in the KWOD van with underage high school girls.

In proceedings in limine, the trial court ruled that plaintiff is a public figure, thereby imposing upon plaintiff the burden to prove falsity of the allegedly defamatory communications and "actual malice," i.e., that defendants made the statements with knowledge or reckless disregard of their falsity. The trial court further found the speech involved matters of public concern, thereby imposing upon plaintiff the burden to prove falsity regardless of his status as a public figure. The trial court also ruled that the statements about sex with minors were slanderous per se, because they imputed criminal conduct, but left to the jury the question whether the race-related statements were slanderous per se, as alleged by plaintiff. Plaintiff's trial theory, as presented to the jury, was that all the statements were defamatory per se, such that injury to reputation was presumed and no actual damages needed to be shown.

Following a two-week jury trial, the jury returned a general verdict in favor of defendants.

Additional facts appear in our discussion.

DISCUSSION

I. PUBLIC FIGURE AND ISSUES OF PUBLIC CONCERN

Plaintiff contends the trial court erred in ruling that he is a public figure and that the speech involved matters of public concern. We disagree.

The trial court ruled plaintiff is both (1) an "all purpose" public figure and (2) a "limited purpose" public figure by reason of having injected himself into the particular public controversy giving rise to the defamation. As will

appear, the effect of the ruling that plaintiff is a public figure was to impose upon plaintiff the burden to prove that the allegedly defamatory statements were false and that defendants made the statements with knowledge or reckless disregard of their falsity.

The trial court also ruled the allegedly defamatory speech involved matters of public concern. This ruling independently imposed on plaintiff the burden to prove falsity of the statements, regardless whether plaintiff is a public figure or private figure. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 753, fn. 37, citing *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [89 L.Ed.2d 783, 792].)

Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. (Lipman *v. Brisbane Elementary Sch. Dist. (1961)* 55 Cal.2d 224, 233.) However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the "public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation." *(Philadelphia Newspapers, Inc. v. Hepps, supra,* 475 U.S. at p. 77S [89 L.Ed.2d at p. 7921; *Brown v. Kelly Broadcasting Co.*, supra, 48 Cal.3d at p. 753, fn. 37.) Additionally, "[i]f the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [citation], that the libelous statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *(Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 256, citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 [11 L.Ed.2d 686, 7061.)

The rationale is twofold: "First, [ ] public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective 'self help.' Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements. [Citation.] Second, and more significantly, [ ] public figures are less deserving of protection than private persons because public figures H have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.' (Citations.]" *(Reader's Digest Assn., supra,* 37 Cal.3d at p. 253, citing *Gertz v. Welch* (1974) 418.U.S. 323, 345 (41 L.Ed.2d 789, 808].) Thus, public figures "'can be said to have voluntarily exposed themselves to public scrutiny and must accept the consequences/'" *(Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1289.)

"For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." (*Gertz, supra,* 418 U.S. at p. 345 [41 L.Ed.2d at p. 8081.) This category is designated "all purpose" public figure. (418 U.S. at p. 351 [41 L.Ed.2d at p. 8121.) All purpose public figurehead will not be lightly assumed; in order for a plaintiff to be deemed an all-purpose public figure, there must be "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." (418 U.S. at p. 352 (41 L.Ed.2d at p. 8121.)

"More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *(Gertz, supra,* 418 U.S. at p. 345 [41 L.Ed.2d at p. 808].) This "limited purpose', or "vortex" public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (418 U.S. at p. 351 [41 L.Ed.2d at P. 812].) "Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." *(Reader's Digest Assn., supra,* 37 Cal.3d at pp. 253-254.)

The designation of public figure may rest on either of these two alternative bases--all-purpose or limited-purpose. *(Gertz, supra,* 418 U.S. at p. 3S2 (41 L.Ed.2d at p. 812].) "In either event, they invite attention and comment." (*Id.* at p. 34S (41 L.Ed.2d at p. 8081.)

The question whether a plaintiff is a public figure is to be determined by the court, not the jury. *(Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 933.) The trial court's decision is a "mixed question of law and fact. [The trial court] must determine the predicate facts upon which it then concludes whether, as a matter of law, a plaintiff is or is not a [ ] public figure. [Citation.] When the appellate court is called upon to review the trial court's decision in this regard, its standard of review is whether, after an independent review of the entire record, substantial evidence supports the trial court's decision. [Citation.]" (*Ibid.*; see also *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842.)

Here, plaintiff complains the trial court improperly made the public figure determination based upon argument rather than evidence. However, although the issue was determined in limine without presentation of evidence, our review looks to the entire record to see if substantial evidence supports the public figure determination. *(Denney v. Lawrence, supra,* 22 Cal.App.4th at p. 933.)

We will first discuss whether KWOD is a public figure.*

At trial plaintiff testified KWOD has been in operation since 1975 and is a 50,000 watt station, which is "the maximum power which is allowed by law in this region of the country." Plaintiff conceded KWOD is "well known to the public." Plaintiff testified he promoted KWOD in the mid-1980's with the slogan "the number one hit music station, KWOD." A decline in ratings since that time would not mean that people were no longer aware of the radio station. In 1993, the *Sacramento News and Review* published an article identified KWOD as "Sacramento's best radio station."

Additionally, in testifying at trial about KWOD's good reputation, plaintiff spoke of KWOD's pervasive power and influence on community affairs. Thus, he testified KWOD "is there for the purpose of entertaining and informing the public and, hopefully, committing to a degree of community service." He also stated: "Since the first day of operation, KWOD has been committed to a variety of good works in the community

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* A business entity may be the subject of defamation. *(Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 770 [corporation].)

including participation in fund raisers for a variety of charitable organizations and Foundations. [¶] Furthermore, we have developed and programmned. large numbers of independently produced radio programs which have been tuned to meeting certain problems and needs within the community. [¶] Lastly, the radio station has been engaged in providing free services to literally, literally tens of thousands of community organizations, clubs, groups, since day one in publicizing their events and matters that they believe are of significance to their own members."

According to plaintiff, KWOD engages in much more public service programming than other radio stations. He gave examples of some of the issues addressed in KWOD's public service programming--youth suicides, causes and treatment of birth defects, lung ailments, the common cold, stress, consumer affairs, taxes, Sacramento light rail system, and an open forum on Sacramento transportation issues. "There were thousands" of such programs. Plaintiff also testified KWOD regularly participates in fund raising events for the March of Dimes, Sacramento SPCA, American Heart Association, and other organizations. According to plaintiff, the reason for involving the station with community service is that "this is the only independently owned and locally owned radio station in the entire community. As a local resident, this is a way of giving something back to the community. It is, in fact, a good proposition in order to maintain close contact and rapport with our audiences."

The allegedly defamatory communications were broadcast by a Sacramento radio station which competes in the same market as KWOD.

This record sufficiently demonstrates that KWOD is an all-purpose public figure by virtue of occupying a position of general fame and pervasive power and influence in the community in which the allegedly defamatory speech was broadcast.

(Waldbaum v. Fairchild Publications, Inc. (D.C. Cir. 1980) 627 F.2d 1287, 1295-12.96, fn. 22 [nationwide fame is not required; question is whether plaintiff has achieved notoriety in community where he was defamed].) Thus, KWOD's control of the airwaves allows it to reach a wide audience. KWOD thrusts itself into the public eye on a daily basis, seeking public attention. KWOD has pervasive involvement in the affairs of society by selecting and presenting public affairs programs on a wide range of topics. Thus, KWOD has 'voluntarily exposed [itself] to public scrutiny and must accept the consequences . . . ." (Live *Oak Publishing, supra,* 234 Cal.App.3d at p. 1289.) Moreover, KWOD is less vulnerable to injury from defamation because of its ability to resort to effective self-help through access to the media. *(Reader's Digest Assn., supra,* 37 Cal.3d at p. 256 [access to media is

a key factor in determining public figure status].) Indeed, KWOD not only has *access* to the media; it *is* a medium.[**]

We conclude KWOD is an all-purpose public figure.

This leaves the question whether plaintiff is a public figure as owner, operator, and general manager of KWOD. We conclude the answer is yes.

Thus, plaintiff brought this lawsuit in his own name "dba KWOD 106 FM," alleging he was and is "an individual conducting business as Radio Station KWOD 106 FM . . . ." The allegedly defamatory remarks referred to KWOD by name and only by extension to plaintiff as owner and operator of the radio station.

[**] Defendants contend the fact that KWOD is subject to FCC regulation is another factor in assessing public figure status. *(Reliance Insurance Co. v. Barron's* (S.D.N.Y. 1977) 442 F.Supp. 1341, 1348.) However, *Blue Ridge Bank v. Veribanc, Inc.* (4th Cir. 1989) 866 F.2d 681, criticized *Reliance* and rejected the proposition that a business enterprise loses the protection of defamation law by being subject to government regulation in the public interest. (866 F.2d at p. 688, citing cases in fn. 11.) We find it unnecessary to rest our opinion on the matter of government regulation.

In *Live Oak Publishing, supra,* 234 Cal.App.3d 1277, we held a newspaper's managers were public figures for purposes of a slander suit. There, the newspaper published an article about a political candidate. A supporter of that candidate accused the newspaper and its managers of intentionally garbling the article to influence the outcome of the election, intentionally "crucifying" the candidate, and lying. (234 Cal.App.3d at pp. 1281-1282, 1287.) We determined both the newspaper and its managerial employees were public figures. (234 Cal.App.3d at pp. 1289-1290.)

"[A]n author, and especially a newspaper, often acts with the purpose of fostering public debate. 'The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs . . . . [Citations.] A newspaper is uniquely possessed of sufficient access to the means of counter argument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. [ ]' [Citations.]" (*Live Oak Publishing, supra,* 234 Cal.App.3d at pp. 1289-1290.)

As to the newspaper's managers, we said: "(These managerial individuals N operated the newspaper. The owner and publisher, general manager and editors of the Escalon Times are intimately involved in public political debate in their community and the community has a legitimate and substantial interest in their conduct regarding the operation of the newspaper. [Citation.] We do not believe these plaintiffs were 'more vulnerable to injury,' justifying any special protection. [Citation.] They, too, are public figures." *(Live Oak Publishing, supra,* 234 Cal.App.3d at p. 1290.)

In *Live Oak Publishing*, we did not specify whether the newspaper's managerial employees were all-purpose or limited purpose public figures. However, we noted the community has a legitimate interest in their conduct "regarding *the operation of the newspaper.*" (234 Cal.App.3d at p. 1290, italics added.) This language suggests the employees' public figure status might be limited to matters regarding the operation of the newspaper.

In this case, we have no occasion to determine whether plaintiff, as owner/operator of a radio station, might be deemed a public figure for all purposes. Thus, for example, we do not face a situation where plaintiff is accused of purely personal wrongful conduct, such as child abuse. Here, the offensive speech related directly to the operation and management of plaintiff's radio station. Thus, for present purposes, it is sufficient to conclude (and we do) that, at least with respect to matters directly related to the operation and management of his radio station, plaintiff is a limited-purpose public figure. We reach this conclusion for all the reasons, described above, that the radio station itself is a public figure. These reasons apply equally to plaintiff as the owner/operator of the station. (See *Live Oak Publishing, supra,* 234 Cal.App.3d at p. 1290.)

We also conclude the trial court did not err in determining the subject matter of the allegedly defamatory speech involved matters of public concern. As indicated, this ruling independently imposed upon plaintiff the burden to prove falsity of the statements.

"When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." *(Philadelphia Newspapers, Inc. v. Hepps, supra,* 475 U.S. at p. 775 [89 L.Ed.2d at p. 7921.)

Plaintiff argues that at the time of defendants, broadcast, there was no public concern regarding plaintiff condoning racist remarks over the air or allowing sex with minors in the KWOD van. However, plaintiff takes too narrow a view. "([W]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." (*Dun & Bradstreet v. Greenmoss Builders* (1985) 472 U.S. 749, 761 [86 L.Ed.2d 593, 604.]) Here, the matter of public concern was irresponsibility in radio broadcasting. That was the topic of defendant's two and a half hour program. The trial court indicated that almost every page of the Morning Zoo transcript contained a reference to responsibility in broadcasting. The conceded purpose off radio is to inform as well as entertain. The pervasive power and influence of radio reaches into homes and offices, schoolyards and street corners. Radio reaches large numbers of people and even children away from parental supervision. For These reasons, we believe responsibility in broadcasting is a matter of public concern. That some statements, such as the "sex with minors in the van" remarks, do not directly implicate broadcasting does not detract from our conclusion. "Freedoms of expression require 'breathing space.'" *(Philadelphia Newspapers, Inc. v. Hepps, Supra,* 475 U.S. at p. 772 [89 L.Ed.2d at p. 790].)

We conclude the trial court properly determined plaintiff is a public figure for purposes of this lawsuit and the speech at issue is of public concern.

II. JURY INSTRUCTIONS

Plaintiff contends the trial court erred in instructing the jury, over his objection, with an assertedly confusing definition of falsity which unfairly enhanced his burden of proving falsity by allowing the jury to consider the truth or falsity of the entire Morning Zoo program rather than the six sentences regarding racism and sex with minors. We disagree.

The trial court instructed the jury as follows:

> An essential element of defamation by slander is that the statement published was false. . . .
>
> Plaintiff has the burden of proving that the information conveyed is substantially false.
>
> *To establish falsity, Plaintiff must prove that the substance, the gist of [sic] the sting of the information conveyed was false.*
>
> . . . . . .
>
> The information conveyed may not be literally true in every word[;] minor inaccuracy or omission of minor detail are not sufficient to amount to falsity.

> Where the information which was inaccurate would have no [ ] different effect on a listener's mind than would the literal truth, the variance is immaterial." (Italics added.)

Plaintiff does not contend the instructions were substantively incorrect. In fact, the instructions correctly stated the law. "The concept that it is the gist or sting of the alleged defamatory statements that must be false rather than the specific details of the charge is deeply rooted in our common law. [Citation.]" *(Weller v. American Broadcasting Companies, Inc.*(1991) 232 Cal.App.3d 991, 1009, fn. 17.)

Plaintiff instead complains the instructions defining falsity were inappropriate under the circumstances of this case, because the jury could conclude the statements were false but the gist of the entire "Morning Zoo" program (the tape and transcript of which were admitted into evidence) was not.

He asserts the instructions gave the jury an "escape hatch by which they could have been influenced that since the proposed slanderous statements took up a total of probably less than a minute of a three hour broadcast that even though they were false were otherwise trivial based on the time devoted to those statements. Where specific isolated statements made in a three hour broadcast are clearly distinct from the total broadcast, a gist instruction is not called for."

Plaintiff cites no legal authority to support his position. In any event, as part of the jury instructions the trial court read to the jury the six specific statements set forth above--four race-related statements and two statements about sex with minors. The jury was told falsity of these statements was an essential element of defamation. We believe that, in context the instructions adequately connected the falsity inquiry to the specific statements.

Plaintiff also complains the gist instruction is not contained in BAJI. However, BAJI is not the sole source of jury instructions. (See Cal. Jury Instns., Civ. (7th ed. 1986) p. VI (judges are free to modify or supplement BAJI instructions].) Moreover, courts have indicated the use of special instructions on the gist of defamatory statements is proper. (See, e.g. *Gantry Constr. Co. v. American Pipe Constr. Co.* (1975) 49 Cal.App.3d 186, 194.)

Plaintiff further contends the gist instruction had no applicability to the "sex with minors" statements because it is inconsistent with slander per se, and the jury should have been so instructed. However, the determination of slander per se merely relieves the plaintiff of the need to prove damages because injury to reputation is presumed; it does not relieve the plaintiff of the obligation to prove the falsity of the statements. (See *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1609; *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 938-939; *Mercado v. Hoefler* (1961) 190 Cal.App.2d 12, 20-21; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 489-490, p. 577.)

Plaintiff also contends the instructions regarding falsity would "cause the jury to believe that even if a statement is false, there's no damage." The contention is without merit.

We conclude plaintiff has failed to show error in the jury instructions.

III. SUBSTANTIAL EVIDENCE

Plaintiff next contends no substantial evidence supports the defense verdict with respect to the "sex with minors" statements. We disagree.

Plaintiff's position is unclear but seems to be that there was no evidence from which a jury could conclude the statements were "anything but knowingly false or made in reckless disregard of the truth."

However, plaintiff did not even establish the statements were false. Thus, the evidence showed as follows:

Collins testified he was told by former KWOD employee Timothy Stevens that Stevens had used the KWOD van for a sexual liaison with high school girls who were minors. This conversation took place in 1985. Stevens indicated the sexual liaison occurred in the early 1980's. The topic arose when Collins was briefing Stevens, who had joined the KSFM staff, on KSFM rules regarding use of the company van. Collins said no non-employees were allowed in the van. Stevens said it was a lot different at KWOD, were [*sic*] non-employees were allowed in the van "if they were good looking enough." Stevens then related an incident where he met a few high school girls at a rally and had sex with them in the KWOD van. Collins said, "Hopefully, they were over 18." Stevens replied they were not.

In the face of this evidence, plaintiff contends on appeal that the "sex with minors" statements implied the practice was current, ongoing, engaged in by numerous KWOD employees, and known to KWOD management. Plaintiff then states there was no evidence that the practice was current, ongoing, engaged in by numerous KWOD employees, and known to KWOD management.

However, even where a statement is defamatory per se, the trier of fact is allowed to view it in context and determine how the statement was understood. *(MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 546.) Here, although the statements were phrased in the present tense, such usage of the present tense to relate past events is a rhetorical device of common usage. Although the statements referred to the plural "members" of radio station staff, they also referred to "radio stations" in the plural. Thus, the statements did not necessarily imply that more than one employee at KWOD was involved. Nor do the statements necessarily imply that the practice was known to KWOD's owner. Collins testified he was referring to KWOD's employees, not its owner, when he said "If you allow your station van [to be used for sex]" then you are an irresponsible broadcaster.

Thus, the jury was not required to draw the inferences sought by plaintiff as to how the "sex with minors" statements were understood.

Moreover, plaintiff fails to show that no substantial evidence supports the verdict on the basis of absence of malice.

We conclude substantial evidence supports the judgment.

IV. NEGATIVE REPUTATION EVIDENCE

Plaintiff next contends the trial court erred in allowing, over his objection, admission of evidence of KWOD's poor reputation, because such evidence is not allowed in slander per se cases, where injury to reputation is presumed. Plaintiff points out the trial court instructed the jury the "sex with minors" statements were slanderous per se, and plaintiff elected to forego actual damages and asked the jury to find the race-related statements were defamatory per se. We find no merit in plaintiff's contention.

On appeal plaintiff fails to specify what evidence he found objectionable. His trial court objection was made as a blanket objection outside of the presence of the jury, before the defense introduced any evidence of KWOD's poor reputation. Since plaintiff fails to cite any specific evidence, we are unable to determine whether there is any reversible error. (Evid. Code, 353, subd. (b) [judgment will not be reversed for erroneous admission of evidence unless appellate court determines error resulted in miscarriage of justice].)

Moreover, the contention is otherwise without merit.

Plaintiff cites inter alia *Clay v. Lagiss* (1956) 143 Cal.App.2d 441, for the proposition that "where [ ] the utterance is slanderous *per se*, damages are presumed and evidence tending to show lack of injury to the reputation is inadmissible." (143 Cal.App.2d at p. 448.)

However, assuming for the sake of argument that the cited rule is still valid (which defendants dispute), the rule would not bar admission of the evidence in this case.

Thus, the rule relied upon by plaintiff anticipates that neither side will put on any evidence of injury to the plaintiff's reputation. Here, during trial plaintiff informed the court his trial theory would be limited to slander per se, i.e., he would not seek actual damages but would ask the jury to find the race-related statements slanderous per se, such that general damages would be presumed. However, plaintiff did not inform the court of this decision until mid-trial, after he had already put in some evidence of KWOD's good reputation, including reference to an FCC report applauding KWOD's "stellar performance . . . meritorious performance in the public interest . . . ."

In ruling that defendants could introduce evidence of KWOD's poor reputation, the trial court stated it had previously been informed of plaintiff's desire to put in evidence of KWOD's good reputation and had indicated to plaintiff that if he did so, the court would allow defendants to introduce evidence of KWOD's poor reputation in rebuttal. The trial court consequently allowed the defense to put in evidence to rebut plaintiff's evidence.

Fundamental fairness supports the trial court's decision.

Plaintiff cites only one case in which the plaintiff put on evidence of injury to reputation--*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991. Plaintiff appears to believe *Weller* allows plaintiffs but not defendants to put on evidence regarding the plaintiff's reputation. However, no issue regarding admission of defense evidence was presented in *Weller*. The issue before the appellate court was whether a jury award for both proven general damages and presumed general damages constituted an impermissible double recovery. (232 Cal.App.3d at pp. 1011-1015.) The court concluded the verdict was not a double

recovery. A plaintiff may be able to prove some but not all damage and is entitled to recover presumed general damages for that component of injury to reputation which is difficult to prove. (232 Cal.App.3d at p. 1014.) The court also rejected the contention that presumed damages may be recovered only in the absence of proven injury to reputation. (232 Cal.App.3d at pp. 1014-1015.) Thus, Weller has no bearing on this case.

We conclude plaintiff fails to show any reversible error in admission of evidence of plaintiff's poor reputation.

V. SLANDER PER SE

Plaintiff contends the trial court erred in allowing the jury to determine whether the race-related statements were defamatory because they were slanderous per se under Civil Code, section 46,*** as tending to directly injure his business. As indicated, the jury was asked to decide whether the race-related statements were slanderous per se.

*** Civil Code section 46 provides in part: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime . . . [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other-occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits . . . [¶] 5. Which, by natural consequence, causes actual damage."

Plaintiff relies on *MacLeod, supra,* 52 Cal.2d 536, which held that where a statement is unambiguous, the trial court must determine as a matter of law whether it is defamatory on its face. (*Id.* at p. 546.)

Here, however, contrary to plaintiff's contention, the race-related statements did not unambiguously state that KWOD had actually made on-the-air racial slurs. Rather, the statements were couched in terms that (1) "[t]he radio station should be part of your life to educate you and it shouldn't, in fact, promote [racial intolerance or violence]"; (2) "[i]t is so bad when people hear on the radio (racial slurs]"; (3) "a snot-nosed runty little punk who thinks his ego can run the radio station, goes on and calls people [racial slurs]; and (4) "I don't think a [ ] [ ] responsible act is for a manager of a radio station to allow [racial slurs]."

None of these statements unambiguously asserted as fact that KWOD made on-the-air racial slurs. The trial court did not err in letting the jury decide whether the remarks were slanderous per se.

Moreover, assuming for the sake of argument that the trial court should have found the statements to be slanderous per se, plaintiff fails to show any basis for reversal of the judgment. (Cal. Const, art. VI, § 13; Code Civ. Proc., § 475 (disregard of nonprejudicial error].) When an issue proceeds to trial and the losing party complains he should have prevailed in pretrial proceedings, it is not enough to show the pretrial ruling was erroneous. The appellant must also show resulting prejudice and the probability of a more favorable outcome at trial. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833 (litigant not prejudiced by having issue submitted to

jury rather than be resolved by summary judgment] ; accord, *Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195.)

Here, plaintiff fails to make any showing of prejudice or the probability of a more favorable outcome at trial.

We conclude plaintiff has failed to demonstrate reversible error.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

(CERTIFIED FOR PARTIAL PUBLICATION.)

SIMS, J.

We concur:

PUGLIA P.J.

SPARKS J.